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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 30

JULIUS A. KRUG, DEPARTMENT OF INTERIOR, PETITIONER,

vs.

SHERIDAN-WYOMING COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1949.
CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 60

JULIUS A. KRUG, DEPARTMENT OF INTERIOR, PETITIONER,

vs.

SHERIDAN-WYOMING COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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"A"-"B" [Caption omitted]

1 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., MONARCH, WYOMING, PLAINTIFF,

vs.

JULIUS A. KRUG, DEPARTMENT OF THE INTERIOR, WASHINGTON, D. C., DEFENDANT.

Reporter's Transcript of Proceedings on Motion for Preliminary Injunction—Filed Dec. 8, 1947

Friday, November 14, 1947.
Washington, D. C.,

The above-entitled action came on for hearing on motion for application for preliminary injunction, before the Honorable Alexander Holtzoff, Associate Justice, at 11:30 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff: T. PETER ANSBERRY, ESQ., and STEPHEN J. MCMAHON, JR., ESQ.;

On behalf of the Defendant: RALPH S. BOYD, ESQ.

2 PROCEEDINGS

THE CLERK: Civil Action No. 4465-47, Sheridan-Wyoming Coal Company, Inc., *vs.* Julius A. Krug.

MR. ANSBERRY: If your Honor please, I represent the plaintiff, with Mr. McMahon. We are ready.

THE COURT: What is the matter which is before me?

ARGUMENT ON BEHALF OF PLAINTIFF

MR. ANSBERRY: If Your Honor please, this is an application for a preliminary injunction, a temporary restraining order having been issued November 4th, ex parte, by Mr. Chief Justice Laws. The temporary restraining order expires, by its terms, today.

The Sheridan-Wyoming Coal Company is a corporation incorporated under the laws of Delaware, with its mining operation headquarters at Monarch, Wyoming. It has held coal mining leases from the Federal Government for a number of years and presently holds a lease executed in 1943.

Some 14 years ago, in January of 1934, the Secretary of the Interior issued a certain regulation having, we contend, the force and effect of law, and issued certain letters having the force and effect of withdrawal of public lands from the public domain for certain public purposes.

This was a part of high economic policy of the executive and legislative departments of the government.

The regulation in question is Regulatio 193.3 of the Fed-
3 eral Code of regulations. It provides, in effect, that no additional coal lands will be—coal mines, rather, I should say—will be authorized unless there is a showing made of need for the coal from those mines which cannot otherwise reasonably be supplied.

The complaint alleges that there has been no finding by the Secretary of the Interior—

THE COURT (interposing): I think I can follow you better if you will tell me what sort of an injunction you are seeking.

MR. ANSBERRY: For a preliminary injunction against the issuance of a coal lease to our competitor, which we contend is prohibited by Regulation 193.3.

THE COURT: What does that regulation provide?

MR. ANSBERRY: Regulation 193.3:

> "Showing Required That An Additional Coal Mine Is Needed. The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

And it gives the conditions.

THE COURT: Is it your contention that the Secretary proposes to make a lease in violation of that?

MR. ANSBERRY: Yes, your Honor.

4 THE COURT: What is the plaintiff's interest in the matter?

MR. ANSBERRY: The plaintiff is, as I say, engaged in the production of this Monarch area coal in Wyoming and has been for the last 30 years, and has an investment in excess of a million dollars. And we contend, as a member of the class of existing coal mines, as distinguished from additional coal mines, it is protected by the regulation.

THE COURT: You do not claim any interest in the property, which the Secretary disregards?

MR. ANSBERRY: No.

THE COURT: You claim that you will be injured by the coming in of additional mines?

MR. ANSBERRY: Yes. And that it is entitled to the protection of the Government under the regulation which is expressed in regulation 193.3.

There are also two letters of Secretary Ickes when the regulation was issued, which further illuminate the policy which was adopted.

I read an excerpt from the letter of the Secretary of the Interior, of January 24, 1934, addressed to the Director of the Geological Survey:

> "The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.
>
> "It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437), and from the interpretation given to section 13 of that act, relating to oil and gas, by the Supreme Court in the case of *United States* v. *Wilbur* (283 U. S. 414), that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued."

THE COURT: Of course, that condition is changed.

MR. ANSBERRY: If your Honor please, the Secretary of the Interior, Mr. Krug, the defendant in this case, has already affirmed the policy of the regulation in this very case, but he says the regulation does not apply.

THE COURT: Of course, I think you have to establish a right to sue. What right have you to bring this suit, any more than any other citizen?

MR. ANSBERRY: We have a special interest as one of the class of existing coal mines, which was purported to be protected by this regulation.

THE COURT: I do not think that this regulation was adopted for the purpose of protecting existing coal mines or saving them from competition. I think it was to safeguard the natural resources of the United States.

MR. ANSBERRY: That is right, from the destruction that would ensue from the wasteful competition, where they were having to mine in an uneconomic manner in order to make ends meet. I am sure that the representative of the Secretary of the Interior will concede that there was a terrible condition at that time, which was unregulated.

THE COURT: Are you familiar with the case of Frothingham against Mellon, which held that an action may not be brought

against the head of a Federal department by a taxpayer or citizen to enjoin him from diverting Government property?

MR. ANSBERRY: Yes, sir, I am.

We rely upon the Chicago Junction case, Supreme Court of the United States, which was reported in 264 U. S. 258, an opinion by Mr. Justice Brandeis.

In that case, the Chicago Junction Railroad Company was about to be sold to the New York Central Railway. If the New York Central obtained it, it intended to exclude, and, in fact had already begun to exclude the Baltimore and Ohio Railroad from the use of that terminal.

Now, in that case, the Baltimore and Ohio sought an injunction against the Interstate Commerce Commission on the ground that there was no evidence whatever to support their finding that the public interest would be served by permitting the New York Central to monopolize the Chicago Junction, and that was admitted
7 in the pleadings of the Interstate Commerce Commission.

In the second part of the opinion, Mr. Justice Brandeis found that under the Interstate Commerce Act the Baltimore and Ohio Railroad had been granted a special interest as a competing railroad sufficient to give them standing to sue, saying:

> "But Transportation Act, 1920 repealed that provision in Section 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company."

That is Page 267 U. S. Reports.

Then Justice Brandeis gave a second ground, which we think is also applicable in this case, namely, the fact that the Interstate Commerce Commission had permitted the Baltimore and Ohio Railroad to file briefs in opposition before them, Mr. Justice Brandeis saying, at Page 268:

> "Moreover, the fact of intervention allowed as it was, implies a finding by the Commission that the plaintiffs have an interest."

In this case the briefs filed before the Department of
8 the Interior, I am told, on behalf of our clients and other protestants to the lease to the Big Horn Coal Company are about four feet high. So our standing to sue has never been questioned before the Department of the Interior, and it comes as

somewhat of a surprise to us to have it challenged here, if your Honor please.

We feel, just as the Baltimore and Ohio Railroad Company in the Chicago Junction case was one of a class protected by a statute, so we are a class protected by a regulation, and, therefore, have a special interest and not the mere standing of an individual, as in the Frothingham case and in the Alabama Power case.

Moreover, we are a Federal lessee now, which the Big Horn Coal Company is not. And this regulation was in force at the time our lease was issued, and we believe that regulation, which would afford us substantial protection, became a part of our lease, the same as any law in the jurisdiction becomes a part of the lease in the jurisdiction in which the lease is issued.

MR. MCMAHON: If your Honor please, I have another point on this which I would like to present.

Even were all of these factors not present—first, the factor of our general interest in the matter being within the protected class; secondly our special interest in view of this particular regulation; third, our interest as a matter of law, in which this
9 terminology of law was a part of the law—we have a fourth point, under which the Supreme Court, in a similar situation, said that even where a company relies and has to rely upon an interpretation of a department or of a governmental head for a number of years, and even though that interpretation might be wrong, nonetheless that mere reliance, where it affects their business, is enough to establish standing to sue. That was in the Oleomargarine case.

MR. ANSBERRY: At this point, your Honor—

THE COURT (interposing): I can only hear one counsel at a time.

MR. ANSBERRY: I would like to raise the point at this time that this injunction was served upon the defendant through his solicitor on November 4th, and that no reply, no points and authorities, nothing was filed in answer until November 13th, and that, under Rule 7-B of the rules of this Court, a motion for preliminary injunction may, if your Honor feels it should be, be taken as conceded—

THE COURT (interposing): No. I wouldn't grant a preliminary injunction by default on any such ground as that. I would not deprive any party of his day in court.

MR. ANSBERRY: I appreciate that. However, if your Honor please, we have had only one day in which to examine the pleadings in the form of a memorandum of points and authorities
10 filed by the defendant.

THE COURT: Have you filed any papers in opposition?

MR. BOYD: Yes, your Honor.

THE COURT: When did you file them?

MR. BOYD: The day before yesterday.

MR. ANSBERRY: I think the filing date is November 13th.

THE COURT: I think you should have filed earlier.

MR. BOYD: We got them from the Department of the Interior only late last Friday.

THE COURT: I am not interested in any delays on the part of the Department of the Interior.

MR. BOYD: We did not know there was such a case until—

THE COURT (interposing): I am not criticizing you personally, of course. But I think the Government is bound by the same rules as other litigants.

MR. BOYD: There is no doubt of that.

THE COURT: I think your client was very dilatory in not informing you earlier.

MR. ANSBERRY: As a matter of courtesy, we did serve the Attorney General with the pleadings on November 5th.

THE COURT: Well, I never let any matter go off on such a point.

MR. ANSBERRY: What we would prefer to do would be to have an opportunity to get our points and authorities, which we have in mere draft form—our points in reply to their points—in
11 better shape.

THE COURT: There is no provision under the rules of this Court for filing reply to points and authorities.

MR. ANSBERRY: They filed a motion to dismiss our complaint.

THE COURT: If you object, I will not hear the motion to dismiss the complaint today. I am going to hear and dispose of the motion for a preliminary injunction. You are entitled to time to answer the defendant. The only thing before me is the motion for a preliminary injunction. That is your motion.

MR. ANSBERRY: Yes. Of course, the papers filed yesterday by the Department of Justice would go both to the motion for a preliminary injunction and to the motion to dismiss the complaint, if your Honor please, and, for that reason, we are somewhat handicapped in presenting it to your Honor in the manner in which we would like to, with our citations in the proper form and quotations properly excerpted.

THE COURT: You may proceed.

MR. ANSBERRY: If your Honor please, I would request permission at this time to file an affidavit which covers certain facts that we believe are pertinent to the emergent nature of our request.

THE COURT: You may file the affidavit.

12 MR. ANSBERRY: It has been served on the Government.

THE COURT: It may be filed.

(The affidavit above referred to was filed with the Court.)

THE COURT: Wherein do you claim that the Secretary of the Interior is violating the regulation? Wherein does the violation appear?

MR. ANSBERRY: In consists in that he has not found either that the Big Horn Coal Company was an old mine, which would take it out of the regulation entirely, and which finding we contend would be absurd since they began operations in 1944 and the regulation was in effect in 1934. He has not made a finding that it was an old mine, as we have alleged in the complaint; and he has not made any finding that there has been an affirmative showing of need for the production of this mine.

We have prepared as a part of this, certain graphs which are referred to in our affidavit, which prove, in our mind, conclusively that there is no need for the production of this mine.

But the point we make is that the Secretary of the Interior has not made the finding requisite under the regulation, namely, that there is a need which cannot otherwise be reasonably supplied for the production of the Big Horn Coal Company. This coal is of
a very low grade bituminous character which will not
13 stand storage, and on account of its high water content, will not stand shipment over long distances, and therefore, is not available for the trade to alleviate the shortage in the trade for which there is need.

THE COURT: I am reading the regulation on which you rely. I do not find in it any provision that the Secretary of the Interior will not make a lease except on the basis of such findings as you recite.

MR. ANSBERRY: "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

THE COURT: But is there a regulation that the Secretary of the Interior will not make a lease except on favorable recommendation of the General Land Office?

Suppose the Secretary of the Interior didn't consider the recommendation of the Land Office?

MR. MCMAHON: Your Honor, under those regulations, which I have not had an opportunity to read completely, but the general purport is that the Secretary acts through his subordinates down the line, and they act through him, and it is all departmental policy, though the final authority is his.

14 THE COURT: The usual practice of Government departments is for the head of the department to act for the subordinates.

Suppose the Secretary of the Interior took it upon himself, without asking any recommendation of the General Land Office, to make such a lease. Is there any law which would prevent that? Would he be exceeding his authority?

MR. ANSBERRY: The Secretary of the Interior has never before departed from Regulation 193.3 by his own decision apart from his subordinates, and he does not purport to do so now. In the very decision of which we complain, the denial of our motion for supervisory authority, he has stated again that Regulation 193.3 represents a sound policy and that he is in agreement with it. He simply takes the view that the Big Horn being an existing coal mine now and a big mine, is not an additional mine within the meaning of the regulation.

However, reading the letters of Secretary Ickes together with the regulation which was issued in pursuance of those letters, we feel that that is an untenable interpretation of the statute expressed in this regulation, because, if your Honor please, under the Mineral Lease Act the Secretary has authority to issue regulations for the control of the leasing and those regulations have been interpreted to grant this statutory authority to issue regulations is a delegation of power and having the force and effect of a
15 statute if not inconsistent therewith.

If we are to assume that by direction of the General Land Office the Secretary did not mean to bind himself to follow the policy he laid down for them, then I think we are getting into a government of men and not of laws. If he is entitled to depart from his established policy in a single case, for reasons unknown to anyone but himself, I feel that we are being denied the equal protection of the law.

THE COURT: A government official has always a right to depart from a policy. He has no right to depart from law.

Mr. ANSBERRY: A regulation, if your Honor please, which we contend has the force and effect of law.

Mr. MCMAHON: On that point, your Honor, as to the general policy which lies behind this regulation having the force and effect of a statute, it ties in with a great, broad, general rule of law which applies only to land cases. Because of the proprietory interest that the Congress has maintained, it has been held that the Secretary of the Interior can exercise that withdrawal of power very informally, just as long as it affects some great, broad, general policy, as it does in this case.

That relates to whether or not these particular letters, to which we referred before, of Secretary Ickes, are, in effect, withdrawal orders of the type discussed in the *Midwest Oil Company* vs. *The United States*, which is a long discussion of this historic with-
16 drawal power and raises many deep and considerably favor-

able points of law upon our particular side of the case, and I just wanted to refer to that, sir.

THE COURT: Very well.

ARGUMENT ON BEHALF OF DEFENDANT

Mr. BOYD: If the Court please, at the outset, I would like to correct two matters of fact that have been stated.

First, the Big Horn Coal Company is not coming in as a new competitor. The Big Horn Coal Company is now operating and has operated in this field for many years.

Mr. ANSBERRY: Since 1944.

THE COURT: I will hear one counsel at a time.

Mr. BOYD: It is an operating, existing mine on state lands at this very moment, and expects only to extend its operations when it receives a lease from the Government.

Secondly, it has been said that the Sheridan-Wyoming Coal Company received its Federal lease when the regulation upon which plaintiffs rely was in force. First, that is incorrect. And, secondly, it is not pleaded.

THE COURT: You say it is not pleaded?

Mr. BOYD: The plaintiff is relying on it.

THE COURT: Well, that is a very technical point.

Mr. BOYD: Well, I don't think it matters.

THE COURT: Let us not talk about things that do not matter. Let us talk about things that do matter. Let us get to the merits.

17 Mr. BOYD: It is the position of the Government, first, that the action of the Secretary in deciding to grant the lease was entirely proper and not in violation of any statute or regulation or anything else. It was a proper exercise of his powers.

Secondly, as your Honor has pointed out, the plaintiff has no standing to sue even if his action were improper.

Thirdly, it is the position of the Government that the Secretary's action in connection with the granting of leases is entirely discretionary and not subject to judicial review.

And fourthly, it is our position that the action cannot be maintained for want of indispensable parties.

THE COURT: I am not impressed by the last point. It has been held time and time again that an action to enjoin a government officer against exceeding his authority is not a suit against the United States.

Mr. BOYD: I believe there are variations on that rule which can be pointed out. It is no cause of action here even if there were something wrong, which we deny. The plaintiffs have no standing to complain of. As your Honor has observed, the regulation is simply a direction to the General Land Office as to what it is to do in con-

nection with making recommendations about the granting of coal leases. It is nothing but an administrative direction by the Secretary to his subordinate officials about what they are to consider
18 when they make recommendations to him with respect to the granting of coal leases. There is no suggestion in that regulation that the Secretary is bound by any kind of a recommendation, whether favorable or unfavorable.

He simply tells the Land Office that unless a certain condition exists it is not to make a favorable recommendation. But if it were to make a favorable recommendation, the Secretary could still refuse to grant the lease. If it were to make an unfavorable recommendation, he still will have his own hands free to decide as his decision may dictate on the facts of the whole case.

We submit that the Secretary cannot abdicate or throw away the discretionary powers which Congress has vested in him.

THE COURT: What is the statutory authority for making these leases?

Mr. BOYD: The Mineral Lease Act of 1920.

THE COURT: The specific provision?

Mr. BOYD: I do not have a copy of the statute with me, your Honor.

THE COURT: Very well. Proceed.

Mr. MCMAHON: I believe it is Section 189 of Title 30, your Honor.

THE COURT: Of the Code?

Mr. BOYD: Of the United States Code. It deals with
19 non-metallic minerals. Several sections take up oil and gas, coal, phosphates, and so on. In substance, they are all similar and the provisions having to do with the oil and gas leasing have been to the Supreme Court of the United States in *U. S.* vs. *Wilbur*, 283 U. S., Page 414.

That was an action to compel the Secretary to grant a lease and the Court held that the Secretary's powers under this statute were entirely discretionary, that he could not be compelled to grant one. By the same token, he cannot be restrained from granting one unless the plaintiff shows some interest in himself and some legal right which will be violated by the action of the Secretary in granting the lease.

This plaintiff has no legal right to have the Secretary not issue this lease to its competitor. The competition which will damage it is entirely lawful. There is no suggestion by the plaintiff that the competition is not lawful.

The case is on all fours with the *Alabama Power Company* vs. *Ickes*, 302 U. S., at Page 464, where the Secretary, in his capacity as Public Works Administrator, was proposing to make loans and grants——

THE COURT (interposing): I recall the case.

Mr. BOYD: The Supreme Court held that competition gave the plaintiff no standing to sue. The plaintiff has said that they rely upon the Chicago Junction case. The Chicago Junction case is distinguished by the Supreme Court from the Alabama Power
20 case, and it is there pointed out by the Supreme Court that the Chicago Junction case turned on the proposition that by virtue of the Transportation Act, the plaintiff had a statutory right to come into court. No such right is claimed here, and none can be.

There is no suggestion that the granting of this lease to the Big Horn Coal Company will violate any legal right of the plaintiff. The only suggestion is that the plaintiff will be damaged in consequence of the competition of the Big Horn Coal Company.

To go back one minute to the regulation, we submit that it is a mere declaration of policy.

THE COURT: You made that point before.

Mr. BOYD: I wanted to bring out the distinction between the declaration of policy and a regulation controlling private rights.

THE COURT: What is the section of the Code relied upon here?

Mr. ANSBERRY: I believe it is 201.

Mr. MCMAHON: The regulatory section is 189.

THE COURT: I am referring to the section authorizing the Secretary to make such leases.

Mr. BOYD: That is 201.

THE COURT: You may proceed. Do you have anything further, Mr. Boyd?

21 MR. BOYD: Yes, your Honor.

Finally, on the question of parties, another Supreme Court decision is, we submit, conclusive—Brady against Work (263 U. S. 435).

In that case a bill in equity was filed in this court, brought against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from issuing a patent to a woman named Harner. Reading from the case:

"The bill avers that the register—

THE COURT (interposing): Do not read from the case. Summarize it briefly.

MR. BOYD: This is summarized in the opinion better than I can do it.

THE COURT: Well, all right. I do not like to have long excerpts read.

MR. BOYD: This is very short.

"The bill avers that the register and receiver, as well as the Commissioner of the Land Office and the Secretary of the Interior, violated the provisions of the Act of May 14, 1880, entitled 'An Act for the relief of settlers on public lands' (21 Stat. 140, c. 89), and

were without authority in deciding in favor of Lillie S. Harner and proposing to issue a patent to her."

Then, skipping:

22 "Lillie S. Harner is the person whom the administrative officers of the Government have held to be entitled to a patent for this land. Clearly the controversy between the plaintiff and those officers involving the granting of a patent to her can not be settled without her presence in court. She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party."

THE COURT: As I follow your quotation, I do not think that case is in point on the question of indispensable parties.

In that case the party claimed to have a legal right to the patent. The Big Horn Coal Company does not claim any legal right. They are asking the Secretary to grant them a lease, in the exercise of his discretion. So I do not think they are an indispensable party.

MR. BOYD: We cannot foresee what the claims of the Big Horn Coal Company will be.

THE COURT: Your position is that the Secretary is making this lease in the exercise of his discretion and not because the Big Horn Coal Company has acquired a right to a patent to the property.

That being so, in my opinion, the Big Horn Coal Company is not an indispensable party, and, for the reason I indicated a few moments ago, I do not think the United States of America is an indispensable party.

23 MR. BOYD: I do not know what the claims of the Big Horn Coal Company will be and we are called upon here to decide, in its absence, that it has no right to a lease.

If this Court should enter an injunction against the Secretary forbidding the granting of a lease and the Big Horn Coal Company should come in tomorrow and sue the Secretary to compel the granting of a lease, we would be in the position of telling them, "You are right, but——"

THE COURT (interposing): The Big Horn Coal Company has applied for a lease and the Secretary has indicated that he will grant the application?

MR. BOYD: That is right.

THE COURT: And this is a motion to enjoin him from carrying out his intention?

MR. BOYD: That is correct.

THE COURT: Your position is that the application of the Big Horn Company was for a lease to be granted in the discretion of the Secretary?

MR. BOYD: That is correct. But the Big Horn Company may take the position that they are entitled to it as a right, and we submit

that the Big Horn Coal Company is entitled to be heard on the question.

THE COURT: Do not fritter away your time on points that do not impress the Court. You have better points than that.

24 MR. BOYD: I believe I have made the points. We submit that the application for the preliminary injunction should be denied.

CLOSING ARGUMENT ON BEHALF OF PLAINTIFF

THE COURT: Does the plaintiff wish to reply?

MR. ANSBERRY: Yes, your Honor.

If your Honor please, you have made the point which I was going to make on the indispensable party.

THE COURT: You do not need to waste time on that.

MR. ANSBERRY: In U. S. against Midwest Oil Company——

THE COURT (interposing): You do not need to consume any time on that point. In my opinion, the point of legality of indispensable parties is not well taken.

MR. ANSBERRY: I direct your Honor's attention, on the point of this regulation, to 30 U. S. Code, Section 189, which specifically empowers the Secretary to limit his broad general power to issue leases by regulation. Those have been held, in Hodgson against Midwest Oil Company, to have the force of law.

THE COURT: I do not find any provision in that section authorizing the Secretary to limit his authority. All that provides is that the Secretary is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry the regulation into effect.

MR. ANSBERRY: In Hodgson against Midwest Oil Company, a man who claimed that he was a prior claimant under exploration
25 provisions of the Act, stated that he had received no notice that a lease was about to be issued by the Secretary to a subsequent explorer and that thereby he had been deprived of due process of law. And he pointed to the fact that the statute does not provide, or did not provide at that time, at any rate, for notice being given to prior claimants in any way whatever.

The statute was upheld by the court, though, in the Hodgson case on the ground that the Secretary had issued a regulation requiring the publication of 30 days' notice in the local paper to all possible claimants before issuing a lease, and the constitutionality of the Lease Act was upheld on the ground that that regulation of the Secretary had the force of a statute, and, therefore, shored up the statute and made it constitutional, which it would not have been otherwise.

(10) That the Undersecretary of the Interior and other agents of the defendant have refused to agree not to issue the questioned leases pending full hearing, if plaintiff were to consent to removal of the temporary restraint pending full hearing; and that the said agents of defendant have indicated they were about to issue the questioned leases the same evening that this court issue its temporary restraining order by its Chief Justice.

(11) That the plaintiff has obtained service of the defendant within this jurisdiction and is unable to obtain jurisdiction of him outside of the District of Columbia.

(12) That plaintiff would be unable to obtain jurisdiction of the Big Horn Coal Company within the District of Columbia except by voluntary appearance of Big Horn after the defendant issued it the questioned leases, because the Big Horn Coal Company is incorporated in Wyoming, maintains no office in the District of Columbia, and on information and belief has no agent for the service of process here. After issuance of the leases the defendant would probably claim and assert that the Big Horn Coal Company was a necessary party inasmuch as he already claims and asserts such even before the Big Horn Coal Company has any legally enforceable interest whatsoever.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated November 14, 1947.

Sworn to and subscribed before me this 14th day of November, 1947. Robert Fribush, Notary Public.

(Exhibit "F" omitted at this point as it is appended to the amended complaint as Exhibit "K".)

Service of a copy acknowledged 11:02 A. M., November 14, 1947.
RALPH S. BOYD.

80 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Findings of Fact and Conclusions of Law

Filed Nov. 17, 1947

This action came on for hearing on plaintiff's motion for a preliminary injunction. The only pleading before the Court for con-

So that if the regulation may have that force in favor of the Secretary, we feel that it should have equal force in opposition to the Secretary.

THE COURT: To what case are you referring?

MR. ANSBERRY: Hodgson vs. Midwest Oil Company, if your Honor please.

THE COURT: Where is that reported?

MR. ANSBERRY: 273 f. 293.

THE COURT: What court decided that?

26 MR. ANSBERRY: A United States District Court; but it is cited in many other cases. It is a leading case on the effect of these regulations.

THE COURT: Was the particular regulation involved in this case involved in that?

MR. ANSBERRY: No.

THE COURT: I do not think you need argue that. The Court agrees with you that the Secretary of the Interior has a right to issue regulations under this act and those may have the force of law.

MR. ANSBERRY: Now then, that he did in this case issue a regulation having the force of law, we believe is demonstrated by the fact that the opening language of this regulation is, "Showing Required That An Additional Coal Mine Is Needed." The language of the head note, particularly, is not directed to the General Land Office, and the Secretary has never treated this before as anything which he could disregard, and he did not state in his later opinion that he is disregarding it here. He says that it does not apply here —that the language does not apply. And we are asking your Honor to interpret the language of the regulation; in effect, the Secretary has said, "It does not apply. If it did, I would deny the lease."

That is in the motion for exercise of supervisory authority, and there has been no attempt at repealing this. It has been
27 reaffirmed two or three or four times in the last few years, as Government counsel, I think, will admit. The regulation has always been treated as giving a litigant within the Department of the Interior a right to protest, and we have been protesting for a year and a half. Now, for the first time, yesterday, we learn that the defendant takes the position that what he tells his subordinates to do is one thing, and what he wants to do is something else, which is a position that has not been taken before.

There has always been an effort on the part of the Department to avoid by distinction this regulation, rather than that he has a right to disregard it.

So, in the Chicago Junction case, on which we rely, Mr. Boyd has referred to the Alabama Power case, and in that very case the Chicago Junction case was approved and distinguished by Mr.

Justice Sutherland, who, incidentally, was a dissenter in the Chicago Junction case against Mr. Justice Brandeis.

The Chicago Junction case is on the principle of freedom from a certain type of competition, you have standing to sue; whereas the Alabama Power Company case stands merely for the principle that the Alabama Power Company did not want the Government to loan money to the municipal power plants. But the Alabama Power Company had exclusive franchises, and there was specific authority for municipalities to engage in the power busi-
28 ness.

The case is entirely different from the one here, where we have a regulation which we say has the force of a statute. The Secretary could satisfy the statute, if the facts were justified, by finding that there was need for this coal mine. But he has never made such a finding in a couple of hearings and a rehearing for——

THE COURT (interposing): You have been over that, I believe. I do not think you need to repeat what you have said. Have you anything additional?

MR. MCMAHON: Your Honor, I had one other point besides the Mineral Lease Act, and also the point of standing to sue, and that is the additional point that there is another statute involved here, Section 141 of Title 43, which is the withdrawal authority of the President, which can be exercised very informally by the Secretary of the Interior; and those refer, not to the regulation, but to those two letters which the Secretary of the Interior wrote. And there are cases which hold that the Secretary does not even have to put his finding in writing which withdraws the public lands from public domain and leases cannot be issued upon them under their terms. Section 141 of Title 43 is most important.

And the Supreme Court has held that even without that particular statute and before it was enacted in this Midwest Oil case, the Secretary could, and the President, in matters involving broad
29 general policy, and in our case it is economic policy, and in the other case it was also broad economic policy—that he could do a thing like that—withdraw them absolutely, as a matter of law.

We have a third statute involved. That is the Federal Procedure Act of 1936, Sections 1002 and 1003.

It has been argued here that the language of this particular regulation is mere internal regulation of the Department. If this were so, they would not be required to publish it. Under the Administrative Procedure Act they are required to publish. It is our point that it means absolutely nothing, if the Government is right, that they can do that.

MR. ANSBERRY: We would like to offer in evidence a graph which is referred to in our affidavit and which shows the long term down

trend in the production of the Sheridan area coal because of lack of demand for it.

THE COURT: You may offer it, and it may be received as a part of the affidavit.

MR. ANSBERRY: If your Honor will examine that, you will see that we have drawn a line through the peacetime peaks of production in the Sheridan area.

THE COURT: I am willing to make it a part of the record, but I do not think that is of any importance as to whether or not there is a need or not a need for this capacity of this additional mine.

30 Mr. MCMAHON: There was also submitted one other point to show the cutting in effect in equity upon our markets in the West.

Mr. ANSBERRY: I think that is probably pretty much conceded.

THE COURT: I think I have heard enough.

Mr. ANSBERRY: I have one other important point, in the case of Brady against Work, from the standpoint that if your Honor should fail to grant us a preliminary injunction or some other form of temporary restraint and the lease were issued, there is no question but that the Big Horn Company would at that point become an indispensable party, and we would be left without a formal disposition on that point, in the event that the preliminary injunction is not granted.

THE COURT: I do not think I will consider that.

Mr. MCMAHON: Just one more point.

THE COURT: I had only suggested that I would hear counsel in reply to the Government.

Mr. MCMAHON: It will take just one moment.

Every point covered by opposing counsel actually goes to their motion to dismiss, which is coming on in a short while.

THE COURT: No. The discretion on these points is proper to be considered in this motion.

Mr. MCMAHON: We have had only one day to answer the
31 defendant's motion. Therefore, the office, as I understand it, of a preliminary injunction, particularly where they are coming in on a motion to dismiss, is whether or not we have made out a prima facie case and are entitled to temporary protection until we can get a full hearing.

RULING OF THE COURT

THE COURT: The Secretary of the Interior proposes to issue a coal mining lease to the Big Horn Coal Company under the provision of the Mineral Lease Act, Title 30 of the Code, Section 201.

The plaintiff, Sheridan-Wyoming Coal Company, Inc., a competitor of the Big Horn Coal Company, moves for a preliminary injunction to restrain the Secretary of the Interior from executing

the lease, on the ground that the making of such a lease is prohibited by a regulation of the Interior Department.

We are confronted, at the outset, with the question of whether the plaintiff has a standing to sue and to ask for such an injunction. The plaintiff has a lease on other mineral lands and is now seeking to prevent competition that will ensue by the granting of the lease to the Big Horn Coal Company.

It is the view of this Court that the plaintiff has no standing to sue. The plaintiff has no legal right to be protected from competition. His lease contains no provision that no other leases should be granted in any particular area to any other
32 concern engaged in the same business.

The position of the plaintiff legally is no different from that of any other citizen or taxpayer. It was well established by a line of cases, commencing with Frothingham against Mellon, that no taxpayer's suit lies against the United States or against a Government officer to restrain him for improperly or illegally disposing of Government property.

On the merits, in my opinion, there is no showing—no substantial showing—that the Secretary of the Interior is violating the law or any regulation that has the force of law. It is true, as counsel for the plaintiff contends, that the Secretary of the Interior is empowered to issue regulations under the Mineral Lease Act which would have the effect of law. The Court finds no regulation, however, which would prevent the Secretary from granting the lease herein requested.

The regulation relied upon is a provision which is, in its phraseology, an instruction to the General Land Office as to the circumstances under which it may make favorable recommendations for segregating lease units.

It is not a statutory limitation, and does not purport to be, of the power of the Secretary of the Interior to grant leases. The statutory power of the Secretary is plenary and involves broad discretionary power on his part to grant or withhold leases
33 in the exercise of his own judgment.

The Court is unable to find that the regulation on which the plaintiff relies in any way limits that authority.

Finally, it appears that the Secretary of the Interior has held that the regulation, if it is one, does not apply to the proposed lease here in question.

It is well settled that where there is an ambiguity in a statute or regulation involving or relating to the activities of a Government department, the construction of the head of the department on that statute or regulation will be accorded great weight by the courts and will be followed and accepted unless found to be palpably

erroneous. The construction appears to the Court to be very reasonable.

What the Court is really asked to do is to substitute its own judgment for the judgment of the Secretary of the Interior as to whether it is wise to grant the proposed lease. This the Court may not do.

For the reasons stated, the Court is of the opinion that no showing is made that the plaintiff is likely to fail at trial and, for that reason, it would be inappropriate to grant the preliminary injunction.

Motion denied.

Mr. ANSBERRY: Will your Honor grant an injunction pending appeal?

34 THE COURT: No.

Mr. ANSBERRY: Or a temporary restraining order pending appeal, to give us a chance to get over to the Court of Appeals?

THE COURT: No. I think you should apply for a stay pending appeal. I am not going to grant a temporary restraining order.

Mr. MCMAHON: It is a matter of time to get it over there, your Honor.

THE COURT: When will you make your application for appeal?

Mr. MCMAHON: This afternoon.

THE COURT: Mr. Boyd, will you agree not to have this lease signed until the plaintiff has an opportunity to apply to the Court of Appeals for a stay pending appeal?

Mr. BOYD: Until a definite time?

THE COURT: Until Tuesday morning.

Mr. ANSBERRY: Your Honor will grant a restraint until Tuesday morning?

THE COURT: I will grant until 4:00 o'clock Tuesday afternoon. I shall grant no further stay because I am denying application for stay pending appeal. But I think you should have an opportunity to make your application.

Mr. MCMAHON: We have a temporary restraining order until Tuesday?

35 Mr. BOYD: As I understand it, the existing temporary restraining order is dissolved.

THE COURT: No. I will continue it until Tuesday at 4:00 o'clock.

(Thereupon, at 12:30 o'clock p. m., the hearing was concluded.)

Reporter's certificate to foregoing transcript omitted in printing.

36 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 4465-'47

SHERIDAN-WYOMING COAL COMPANY, INC., Monarch, Wyoming,
PLAINTIFF

v.

JULIUS A. KRUG, Department of Interior, Washington, D. C.,
DEFENDANT

COMPLAINT FOR AN INJUNCTION—Filed Nov. 4, 1947

The plaintiff for its complaint herein states to this Honorable Court as follows:

First. The Sheridan-Wyoming Coal Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Monarch, Wyoming. It is engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states, to-wit, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri.

Second. The defendant is the duly qualified Secretary of the Interior of the United States, holding unto himself certain powers, duties and trusts thereunder and only by virtue of his office thereunder.

Third. This case arises under and by virtue of the laws of the United States, including the Act of June 11, 1946, 5 U. S. C. 1002, the Act of February 25, 1920, 30 U. S. C. 189, 201 et seq., and the Act of June 25, 1910, 43 U. S. C. 141 and regulations issued thereunder, more particularly Sec. 193.3 of Title 43, Federal Code
37 of Regulations. The amount in controversy exceeds $3000, exclusive of interest and costs.

Fourth. On January 24, 1934, the defendant's predecessor in office caused to be issued certain directive orders in letter form having the force and effect of statute, effectively withdrawing all public coal lands for coal leasing purposes except that certain public coal land for which could be shown an actual need which could not otherwise be reasonably met. Excerpted copy attached hereto and made a part hereof marked Exhibit A and Exhibit B.

Fifth. On January 6, 1944, one, the Big Horn Construction Company assigned its coal lease running from the State of Wyoming to

one, the Big Horn Coal Company. This lease was dated December 2, 1943, although the cognizant officers of the State of Wyoming did not approve it until February 3, 1944. During the month of December, 1943, the Big Horn Coal Company

(a) began construction and development of their new mine on their State land,

(b) perfected their incorporation, and

(c) filed applications for a lease of adjoining Federal coal lands on the ground that such Federal land was necessary to the commencement of their new mine.

All three acts enumerated as a, b, and c above were made in concert and therefore necessarily part and parcel of each other.

Sixth. When the pendency of the Big Horn Applications became known to the within plaintiff it filed protests against the issuance of the leases by the defendant to the said Big Horn Coal Company.

38 *Seventh.* On October 2, 1945, the defendant through the Undersecretary of the Interior, the Hon. Oscar L. Chapman, held a hearing at Denver, Colorado. At said hearing the Big Horn Coal Company urged its right to have defendant grant its application and award it a coal lease despite the aforementioned Regulation 193.3, Title 43, Code of Federal Regulations. The within plaintiff urged the disallowance of any award of said lease to Federal coal lands under said Regulation 193.3. Briefs and oral arguments were received from both the applicant Big Horn Coal Company and the within plaintiff.

Eighth. Some two years after the Big Horn Coal Company had first filed its lease application, the defendant, pursuant to legal requirement, published notice that for coal leasing purposes, he would receive offers and protests thereto on this same Federal coal land covered by the Big Horn application.

Ninth. On January 16, 1946, the Big Horn Coal Company offered to lease these public lands at a certain fixed rental. Such offer was not accepted by the defendant because of the aforementioned protests which were filed by the within plaintiff prior thereto. For this reason the defendant did not make then an award of the lease to the Big Horn Coal Company.

Tenth. On April 10, 1947, the defendant through his Director of the Bureau of Land Management, Hon. Fred W. Johnson, issued a certain writing denominated decision. Said decision contained the following:

(a) A conclusory and inferential attempt to make a finding of an old mine from a recital of so called hardship.

(b) Probative findings of fact which would necessarily compel as a matter of law a finding of a new mine.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need.

A copy of said decision is attached hereto and made a part hereof, marked Exhibit C.

Eleventh. On July 29, 1947, the defendant through his Undersecretary of the Interior, the Hon. Oscar L. Chapman, issued a writing denominated "Motion for Rehearing" which the within plaintiff had previously filed. Said decision contained the following:

(a) A reversal of the implicatory finding of an old mine previously made by the decision of April 10th although it reiterated the recital of so-called hardship in connection therewith.

(b) A finding that Big Horn was a new mine although a large and going one.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need although it expressed the possibility that the within plaintiff and the Big Horn Coal Company could possibly exist.

A copy of the dismissal of said motion for rehearing is attached hereto and made a part hereof, marked Exhibit D.

Twelfth. On October 22, 1947, the defendant issued a certain writing denominated "Motion for the Exercise of Supervisory Power." Said writing dismissed such motion which had been made previously by the within plaintiff. Said writing contained the following:

(a) An inferential restatement of the previous finding of a new mine in the denial of the motion for rehearing of July 29, 1947, and a repetition of the large going business finding.

(b) Probative findings of fact of a new mine by reference to the decision dated April 10, 1947, which would as a matter of law compel the finding of a new mine.

(c) A total omission of any finding that the coal to be mined from the Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need and complete elimination of the reference made in the dismissal of the "Motion for Rehearing" to a possibility of both mines existing.

A copy of said writing of October 22nd is attached hereto and made a part hereof, marked Exhibit E.

Thirteenth. Plaintiff further alleges that the within defendant is granted only restricted power and authority under the aforementioned Regulation 193.3 thereby limiting his discretion to grant a lease in the premises only upon the conditions that an applicant show a meeting of the criteria or requisites of Regulation 193.3. Therefore any issuance of Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company would be void and illegal because

(a) there has been no finding of the regulatory requisites and

(b) there could be no finding of the regulatory requisites in the premises.

41 *Fourteenth.* Plaintiff further alleges that the effective withdrawal orders issued January 24, 1934, by the defendant's predecessor in office were the effective exercise through a proper officer under law of power and authority conferred by 43 U. S. C. 141 *141* withdrawing the public land covered by the Big Horn lease applications, Buffalo Nos. 037885 and 039466 in the premises.

Fifteenth. Plaintiff further alleges that it is within the protected class established by the aforementioned Regulation 193.3 having the force and effect of statute.

Sixteenth. Plaintiff further alleges that the imminent threatened issuance of Buffalo leases Nos. 037885 and 039466 will irreparably and wrongfully damage to a large but unascertainable extent the business and trade of plaintiff in violation of the very manifest purpose of Regulation 193.3 Plaintiff alleges that it has already suffered loss of markets, loss of sales, loss of customers, loss of trade, and loss of profits resulting from the Big Horn Coal Company's operations on non-Federal lands. The granting of the aforementioned leases to the Big Horn Coal Company for its operation on Federal lands would result in irreparable damage in that further loss of markets, sales, customers, trade and profits, through increasing Big Horn's limited reserves, would result in an appreciable although unascertainable amount not readily compensable in damages. For which reason plaintiff has no plain or adequate remedy at law.

On information and belief, the aforesaid contract of lease are about to be executed and delivered by the defendant to a foreign corporation which cannot be served in the D. of C. with process

in respect of such lease, claimed by plaintiff to be illegal and in violation of its rights.

Wherefore, the plaintiff prays:

(a) That this Court issue its temporary restraining order against the within defendant, his agents, deputies, employees and all persons acting in concert or participation with
42-60 him or under his direction, enjoining and restraining them from issuing, signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company of Sheridan, Wyoming.

(b) That upon the hearing of motion for a preliminary injunction that the Court continue the temporary restraining order in effect as a preliminary injunction.

(c) That upon final hearing the Court permanently enjoin the defendant, his agents, deputies, employees, and all persons acting in concert or participation with him from issuing or attempting to issue, or signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo No-. 037885 and 039466 to the Big Horn Coal Company.

(d) That upon final hearing this Honorable Court may grant the plaintiff such other, further and different relief as may to the Court seem proper and just in the premises.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff,
1029 Vermont Avenue, N. W.

Dated November 1947.

(Exhibits "A" to "E" inc. omitted at this point as they are appended to the amended complaint.)

61 [Verification omitted]

62 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed Nov. 4, 1947

Comes now the plaintiff in the above entitled cause and respectfully moves this Honorable Court to grant a preliminary injunction as prayed for in the accompanying complaint.

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.,
Attorneys for Plaintiff.

Dated November —, 1947.

Personally served copy of the within motion on Julius A. Krug by serving Martin G. White, Solicitor, 11-4-47.

W. B. Matthews, U. S. Marshal in and for the D. of C. By C. H. Ward, Deputy U. S. Marshal.

Personally served copy of the within motion on U. S. Dist. Atty. G. M. Fay, 11-5-47.

W. B. Matthews, U. S. Marshal in and for the D. of C. By C. H. Ward, Deputy U. S. Marshal.

63 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—Filed Nov. 13, 1947

Comes now the defendant, Julius A. Krug, Secretary of the Interior, by his attorney, and moves the Court to dismiss the action on the grounds

1. The complaint fails to state a claim upon which relief can be granted;

2. The complaint shows on its face that the Big Horn Coal Company and the United States of America are indispensable parties defendant which cannot be made parties;

3. The complaint fails to show that the plaintiff has any standing to maintain this action;

4. The action of the Secretary of the Interior which the complaint seeks to control is not subject to judicial review; and

5. The action of the Secretary of the Interior which the plaintiff seeks to enjoin is fully authorized by a valid act of Congress and the plaintiff, therefore, has no cause of action.

RALPH S. BOYD,
Attorney, Department of Justice,
Attorney for Defendant.

64 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

In support of the foregoing motion, defendant relies upon the points and authorities filed herein on the 13th day of November, 1947 in opposition to plaintiff's motion for a preliminary injunction.

65-74 NOTICE OF MOTION

To: T. Peter Ansberry and Stephen J. McMahon, Jr., Esquires, 1029 Vermont Avenue, N. W., Washington, D. C.

PLEASE TAKE NOTICE that the motion and memorandum of points and authorities in support thereof, of which the foregoing are copies, have this day been filed with the Clerk of the United States District Court for the District of Columbia. The Rules of Court provide that if you intend to oppose the granting of the motion you must, within five days after service of the foregoing copies upon you, file with the Clerk a memorandum of points and authorities upon which you rely in opposition, otherwise, the motion may be taken as conceded.

RALPH S. BOYD,
Attorney, Department of Justice,
Attorney for Defendant.

Washington, D. C. November 13, 1947.

Service of a copy of the foregoing is hereby acknowledged this 13th day of November, 1947. 11.45 A.M.

PETER ANSBERRY,
Attorney for Plaintiff.

75 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

AFFIDAVIT COVERING CURRENT FACTS IN SUPPORT OF PLAINTIFF'S COMPLAINT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION—Filed Nov. 14, 1947

T. Peter Ansberry and Stephen J. McMahon, Jr., being first duly sworn, depose and say:

(1) That they are members of the bar of this Honorable Court and are the attorneys for the plaintiff herein, the Sheridan Wyoming Coal Company, a foreign corporation which has no officers within this jurisdiction; that they are in telephonic communication with responsible officers of the plaintiff, whose operating headquarters are at Monarch, Wyoming.

(2) That the Sheridan-Wyoming Coal Company holds a coal mining lease, issued in 1943 (Buffalo 037167 "N"), from the United States to certain public lands located in and around Monarch and Sheridan, Wyoming. That the plaintiff has approximately one million dollars of investment in connection with its business of mining and marketing coal. That a sizable but unascertainable portion of said investment cannot be salvaged in the event that a sizable but unascertainable portion of its markets are destroyed by the within defendant's imminently threatened illegal action.

76 (3) That a graph (Exhibit F, attached hereto and made a part hereof) has been prepared from records of the State of Wyoming, duly authenticated, and other authenticated official sources, showing the inroads which have been made into these markets by the Big Horn Coal Company in the past because of its mining operations on lands belonging to the State of Wyoming, which lands are subject to the disposal laws of the State of Wyoming. This graph also makes certain projections of future demand, which are based on expert opinion and mathematical probability. This latter element proves there is no need for Big Horn's production.

(4) That this graph indicates the disastrous effect upon the market and sales of the plaintiff if the defendant be allowed to take the illegal and unauthorized action which he imminently threatens, to wit, by granting certain coal leases to the Big Horn Coal Company for the coal lands in contravention to the law of Regulation 193 3 and the statutes under which it was issued.

(5) That Fred Whiteside on behalf of the Big Horn Coal Company, by affidavit of October 1, 1946, admitted that the Big Horn Coal Company would not need the Federal coal in question for its operations until 1.87 years thereafter, assuming a yearly ratio of consumption of 500,000 tons per year (which has been the approximate rate). Such admission shows that the Big Horn Coal Company is in no emergent need for the coal in question. Affiants are under the impression that the Big Horn Coal Company by a later admission advanced their calculation of immediate need to March of 1948 but affiants are unable to locate this admission in the voluminous papers filed by the Big Horn Coal Company. Accordingly, Big Horn has no immediate need of this coal.

77 (6) That responsible officers of the Department of the Interior have undertaken to cooperate in locating certain documents and papers underlying Regulation 193.3. Title 43, C.F.R., and underlying the letters of withdrawal issued by the Secretary of the Interior, January 24, 1934.

(7) That it is known that such papers relate to overall executive policy of the administration of the Executive Department of the government as relating to the National Recovery Administration and it is believed that action was taken with the acquiescence and/or approval, and/or direction, and/or furtherance of general administrative policy, and/or documentation of the head of the Executive Branch of the government, the President of the United States. That affiants are attempting to locate the connecting records between the Interior Department, the National Recovery Administration, and the Executive Mansion, and that they are receiving the cooperation of the defendant's agents in this respect.

(8) That the within defendant is recuperating from recent illness and is out of the City. That plaintiff's attorneys are unable to see him for that reason, and that when plaintiff's attorneys did last see the defendant some four weeks ago he was then under the impression (a) that the Big Horn mine was an old mine and was not a new mine; (b) that in previous cases of this sort administratively handled within his Department they had been universally decided in favor of applicants (whereas exactly the opposite is true, and all cases involving the application of Regulation 193.3 had been universally decided against the applicant during the last fourteen years within the information and belief of affiants); and that on information and belief, the same confusion and mistake on the part of the defendant continues.

78-79 (9) That the Undersecretary of the Interior has refused a continuance until the defendant's return although he is familiar with the misunderstanding about the aforementioned facts.

the Big Horn Coal Company. Consequently, we assert that the issuance of the lease is in violation of the regulation. It is a very interesting commentary on the wisdom of this regulation with its exception clause.

At the moment, the Monarch area co-industry is in about as bad shape as it has been in the last 20 years. The railroads in that area have completely dieselized and have virtually ceased to buy coal. This consumed over half of the coal which was normally sold in the area which was produced by Sheridan prior to Big Horn getting its start as a State lessee.

Big Horn, when it did get its start as a State lessee several years ago, simultaneously applied for a Federal lease and alleged that it was unable to continue on the State land because it would run out of State coal very quickly. Big Horn has made a deliberate
112 effort to get around the wise provisions of the regulation.

Mr. Boyd has referred to the power of the Secretary to change their regulations. In the first place, regulation 193.3 has not been repealed by the Secretary. We contend it could not be repealed by the Secretary due to the reenactment of the Mineral Leasing Act upon a settled practice of the Secretary of Interior in rejecting leases which cannot satisfy the criteria of the statutory regulation.

Our company, the Sheridan-Wyoming Coal Company, has expended over $1,300,000. Sheridan, in that particular small area had no competition prior to Big Horn's coming into the fields, and would have no competition if Big Horn left.

However, other companies have always competed with Sheridan-Wyoming and would continue to do so in the future. There is no possibility of a squeeze on the public. That is not even suggested by the Department of Interior. However, we do state that if this lease is granted, both companies will be out of business very shortly because the demand for coal has actually developed even worse than we projected it in our exhibits attached to the original complaint.

The result is, if the Secretary of Interior can violate his own regulation and issue this lease in defiance of it, our company which has expended $1,300,000 on the faith of this lease, will in a very short time be bankrupt.

It is in the red now. Owing to the very sweeping ruling
113 of Judge Holtzoff, we did not amend our complaint. We did not amend it because on his theory, whether we were amended or not, we were without standing to sue. There was no objection from the defendant to argument in the District Court which covered the lease fully.

We had an allegation in the complaint that we were a member of a protected class which was intended to set up as Federal coal

sideration was plaintiff's verified complaint. At the hearing plaintiff offered and the Court received an affidavit of plaintiff's counsel. Defendant raised no issue of fact by pleading or otherwise. Therefore, for the purpose of considering plaintiff's motion for a preliminary injunction and for that purpose only, the Court, on the basis of the complaint and the affidavit of plaintiff's counsel, makes the following

Findings of Fact

1. The Sheridan-Wyoming Coal Company, Inc., is a corporation existing under the laws of Delaware, with its principal offices in Monarch, Wyoming.

2. The Defendant, Julius A. Krug, is the duly qualified Secretary of the Interior of the United States.

3. Plaintiff is engaged in mining and distributing sub-bituminous low-grade coal in the markets of 12 western states.

81 4. The defendant is about to issue a coal lease of certain lands of the United States to the Big Horn Coal Company, pursuant to their application, under authority of the Mineral Leasing Act, as amended, 30 U. S. C. 201.

5. The Big Horn Coal Company competes with the Sheridan-Wyoming Coal Company, Inc., in the production and sale of coal and, if granted a coal lease by the Secretary of the Interior, will produce coal from the lands of the United States and use that coal in competing with plaintiff. The Big Horn Coal Company is not a lessee of any federal coal lands. The plaintiff alleges that competition on the part of the Big Horn Coal Company will reduce the plaintiff's sales. The Big Horn Coal Company is not subject to service of process in the District of Columbia. Plaintiff has protested to defendant against the issuance of a coal lease to the Big Horn Coal Company, Inc. but defendant has overruled plaintiff's protests.

6. Plaintiff based its protest on the ground that the granting of a lease to the Big Horn Coal Company by defendant would violate sec. 193.3 of Title 43 of the Code of Federal Regulations and has exhausted all its administrative remedies before the Department of the Interior.

From the foregoing findings of fact, the Court draws the following

Conclusions of Law

1. Plaintiff's application for a preliminary injunction prohibiting the defendant from granting a coal lease to the Big Horn Coal Com-

lessees, a franchise class like the situation in Frost versus the Commission in the Supreme Court where in that case there was a State law which required a cotton ginner to have a license, if Your Honor recalls the case.

It required in order to have a license to operate a cotton gin in this southern State, the applicant must show there was need for his services. A license was issued to a competitor of Mr. Frost without that showing of need for the competing cotton gin, and the Supreme Court held that the issuance of that lease was illegal.

We think we stand on all fours with the Frost case, assuming we are permitted to amend our complaint.

The Court of Appeals stated in its opinion that they issued the temporary injunction pending appeal because they had the lease before them. They were unable to reverse the holding of the District Court because for purposes of the appeals, they did not have before them this same lease which we are now seeking to insert into the record.

114 My associate, Mr. McMahon, has a few words to say.

MR. MCMAHON: I would like to address myself to apply to Mr. Boyd's argument, however, merely as to the merits of the two motions, rather than the general motion of the case.

Mr. Boyd started off with opposition to our filing the amended complaint as of course on the ground that plaintiff takes the position that the motion to dismiss the original complaint was not a responsive pleading, therefore, the complaint can be amended despite the fact that the motion to dismiss was sustained.

The cases I have examined are all one way on the point of an amendment as of course being allowed under Rule 15-A at any time prior to a responsive pleading.

A motion to dismiss is not a responsive pleading. Our position on that score is that we are entitled to file our amended complaint as of course.

We filed the other motion for leave to file that complaint merely because of the shortness of time. We thought it would bring up the question if the Department of Justice objected, which they did, in an informal way. They objected to the filing of our amended complaint.

The second point which Mr. Boyd made was that the amended complaint which plaintiff has tendered does not show any facts which either did not exist or were not known to plaintiff or its counsel when the original complaint was filed, or at least

115 when the original complaint was dismissed.

Mr. Boyd offered criticism. He said we did not amend after that point. Mr. Boyd accepted our argument under the lease that day in court as contained in the complaint. He did not make any objection at that point. He did not ask information which was

pany should be denied because there is no substantial likelihood that plaintiff can prevail at the final hearing of this action.

2. Plaintiff has not alleged or shown that it has any standing to sue because it has not shown that the intended action of the Secretary of the Interior will violate any legal right of plaintiff.

82-84 3. The power of the Secretary of the Interior in granting coal leases under the Mineral Leasing Act, as amended, 30 U. S. C. 201, is discretionary and not subject to judicial review.

4. Sec. 193.3 of Title 43, Code of Federal Regulations, is a declaration of policy by the Secretary which does not diminish or restrict the Secretary's powers and discretion vested in him by the Mineral Leasing Act.

5. The Big Horn Coal Company, the proposed lessee, is not a necessary party to this action. The United States is not a necessary party to this action.

ALEXANDER HOLTZOFF,
Justice.

Washington, D. C. November 17, 1947.
No objection as to form.

T. PETER ANSBERRY,
Attorneys for Plaintiff.

85 Clerk's Certificate to foregoing transcript omitted in printing.

86 UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

[File endorsement omitted]

No. 9704

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued January 12, 1948. Decided March 29, 1948.

MR. T. PETER ANSBERRY, with whom MR. STEPHEN J. MCMAHON, JR., was on the brief for *Appellant*.

his proper remedy. He did not ask for a more specific bill of complaint.

The reason we did not do that is that it seemed vain to do so inasmuch as Judge Holtzoff took it into consideration in his opinion.

The third point which Mr. Boyd makes is that it is much easier for plaintiff to follow a court in which two bites would not have to be made after the cherry.

The reason for that is that the Court of Appeals framed their opinion and also their order upon our application over the opposition in the form that they did.

We are required to proceed under that outline.

The defendant also makes a point of the fact that he claims that this third party, the Big Horn Coal Company, who was the candidate for this lease before the Secretary of Interior, would be greatly damaged by delay. The Court of Appeals accepted affidavits on that point, and went over it thoroughly before they granted us a temporary injunction pending appeal last December 4. They extended it over and beyond the time that the mandate of the
116 Court of Appeals reached this court, to give this court an opportunity to act.

Further than that, Mr. Boyd asked for a thirty-day extension in the meantime to stay the mandate in the Court of Appeals while they considered whether or not they should apply for certiorari because of the form of the court's amendment to their original opinion allowing this court to entertain an amending of the complaint motion.

The last point which Mr. Boyd made is that the only reference to the lease, the regulations promulgated shall have the right to cancel these—and so forth—I submit that all goes to the merits of the case and the proper remedy on that score, if Mr. Boyd thinks he has any objection as to the validity of this amendment, is a motion to dismiss after it is amended.

I have a case here which I would like to make a part of the record. It is Judge Thatcher's case. It was just about the same type of case. The parties were in the District Court. They wanted to amend their complaint two years after the filing of the original complaint.

The following language is quoted from page 312 of 31 Fed. 2d, Carnahan versus Peabody, District Court, Southern District of New York, 1929:

"To deny the motion to amend for defects in the amended pleading, not considered on the prior motion to dismiss, would seriously prejudice the right to review a determination,
117 in form discretionary, but in fact going to the merits of the plaintiff's cause of suit. Proper practice in such case is to grant the motion to amend, and then consider upon motion

to dismiss, all questions not previously decided which go to the sufficiency of the bill as amended. Substantial rights of the parties are not affected by the amendment, nor has the prior bill of complaint been answered."

That is the end of the quotation.

Your Honor, there is one general point about Mr. Boyd's argument and about this memorandum he previously submitted.

In reply to our original memorandum in support of both of our motions, he did not undertake to answer any but one of the cases. That is a point I shall not go into. He discussed one. It occurred to me that there is an admission contained in both his argument and this memoranda; that it is impossible to object to an amendment at this point and under the circumstances. He has cited no cases in support of his view.

That concludes my remarks.

THE COURT: Did I understand you to say that this opinion which Mr. Ansberry handed me has been amended?

MR. MCMAHON: Yes, Your Honor. I perhaps can find it in the record.

MR. BOYD: It was not the opinion, the mandate.

118 MR. MCMAHON: The judgment.

MR. BOYD: The judgment.

THE COURT: That is the amendment that you speak about?

MR. ANSBERRY: That is correct.

THE COURT: Very well, gentlemen. Is that all?

MR. ANSBERRY: I have one more thing. Mr. Boyd suggested that we had the lease in our hands at the time of the hearing on the motion to dismiss. That, as a matter of fact, is incorrect. I did not have the lease before me at that time in full. I had excerpts from the lease at that time.

MR. BOYD: If Your Honor please, I did not say that Mr. Ansberry had the lease. I said there is no showing that he did not. Secondly, he said he had excerpts. The form of lease as described by the regulations is published in the Federal Code of Regulations, so it is available to the whole world.

He suggested to Your Honor that there is no need for the Big Horn Coal Company's production, but Sheridan-Wyoming, the plaintiff in this case, is presently applying to the Department of Interior for the extension of its leases to additional Federal coal lands so it can expand its production in this area. So if there is need for expansion for the plaintiff, it would seem to be only reasonable that there is need for coal production.

They are simply trying to produce it themselves rather
119 than have a competitor in the field.

As to the point that I did not answer, those cases they

MR. ROGER P. MARQUIS, Attorney, Department of Justice for *Appellee*.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, J.J.

OPINION—Filed March 29, 1948

PRETTYMAN, *J.*:

Appellant was plaintiff in a civil action brought in the District Court to restrain the appellee Secretary from executing and delivering to the Big Horn Coal Company two mining leases of federal coal land. The Secretary moved to dismiss the complaint upon the ground, among others, that it failed to state a cause of action upon which relief could be granted. The District Court granted the motion upon that ground.

In its complaint plaintiff alleged that it was "engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states" and, further, that "it is within the protected class established by . . . Regulation 193.3[1] having the force and effect of statute." It alleged that that regulation precludes the granting of further leases of public coal lands, unless it be shown that there is an actual need for coal which cannot otherwise reasonably be met. These were the only allegations in the complaint concerning the status and rights of the plaintiff. The claim thus depicted was a general right of the coal industry to be protected against further competition. Under the decisions of the Supreme Court in *Alabama Power Co.* v. *Ickes*,[2] and kindred
87 cases,[3] the District Court was clearly correct in holding that claim not one which the courts could entertain. Those cases dispose of appellant's first point, that as a member of the existing coal industry it had a standing to sue for protection against the proposed new lease. Obviously, appellant had no right, derivative from his membership in the existing coal industry, to complain of competition from other coal companies, new or old. Therefore, under those cases, the mere coincidence of some illegality which enables Big Horn to compete, is immaterial.

Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands; that the regulation above mentioned, having the force of a statute, was part of its lease; and that

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[1] 43 Code Fed. Regs. § 193.3 (1938) (Dept. of the Interior Regulations Applicable to Coal Permits, Leases, and Licenses Exclusive of Alaska).

[2] 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).

[3] Tennessee Power Co. v. T. V. A., 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939); New Orleans, M. and T. R. R. v Ellerman, 105 U. S. 166, 26 L. Ed. 1015 (1882).

this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the *Chicago Junction Case*[4] and kindred cases[5] and under the general considerations which controlled the Court in deciding *Federal Communications Comm'n v. National Broadcasting Co. (KOA)*[6] and similar cases.[7] Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses. Under the decisions, those persons were entitled to sue. The difficulty with the contention in the present case is that no such claim was stated in the complaint.[8] Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease.

The Rules of Civil Procedure[9] provide that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief". The Rule was intended to obviate the technicalities of pleading and, particularly, long and verbose allegations of evidentiary facts. With that objective we are in unqualified accord. However, a "claim" cannot be stated in the form of a legal conclusion, without more, such as the above-quoted allegation as to the "protected class". The minimum under the Rule is that the adversary party must be sufficiently advised to prepare his defense, and that the court must be sufficiently informed to determine the question presented. Defenses cannot be made to legal propositions in the abstract, nor do mere legal conclusions present questions upon which the court can pass. Justiciable cases and controversies arise upon facts.[10] The case at bar is an illus-

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[4] Baltimore & Ohio R. R. v. United States, 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[5] Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929); Germania Iron Co. v. James, 89 Fed. 811 (C. C. A. 8th 1898).

[6] 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943).

[7] Federal Communications Comm'n v. Sanders Radio Station, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940); *see* Mr. Justice Douglas, dissenting in Scripps-Howard Radio v. Comm'n, 316 U. S. 4, 21, 86 L. Ed. 1229, 62 S. Ct. 875 (1942).

[8] Perkins v. Lukens Steel Co., 310 U. S. 113, 125, 84 L. Ed. 1108, 60 S. Ct. 869 (1940).

[9] Fed. R. Civ. P., 8(a)(2).

[10] Authorities need hardly be cited, but *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239 *et seq.*, 81 L. Ed. 617, 57 S. Ct. 461 (1937), is a succinct recent statement.

88 tration. The court cannot pass upon a contention concerning the content, meaning and effect of a lease, when the plaintiff does not allege in its complaint either the execution or the content of the lease, or, indeed, even that it is a lessee.

In the District Court the plaintiff filed a motion for a preliminary injunction and, at the hearing on that motion, filed a paper executed by its counsel and entitled "Affidavit Covering Current Facts in Support of Plaintiff's Complaint and in Support of Plaintiff's Motion for Preliminary Injunction". The court accepted the affidavit for the purpose of deciding the motion, and for that purpose made findings of fact and reached conclusions of law. The affiants said, among other things, "That the Sheridan-Wyoming Coal Company holds a coal mining lease, issued in 1943 (Buffalo 037167 'N'), from the United States to certain public lands located in and around Monarch and Sheridan, Wyoming." Apart from the question whether so general an allegation, if it had appeared in the complaint, was sufficient to place in issue the nature and content of the lease, it seems clear that the affidavit of counsel was not part of the consideration of the District Court upon the motion to dismiss. The defendant did not have to plead to the affidavit, and it had a right to require the court to pass upon the sufficiency of the claim presented by the complaint, and not upon some other claim otherwise presented. The District Court passed upon the claim presented by the complaint, and that is all it was required or empowered to do. The Rule above cited is simple and plain and represents the minimum essential for the orderly presentation, determination and disposition of cases and controversies by the courts.

In this court appellant filed a motion for a temporary injunction pending appeal. Appellee opposed and filed an affidavit of the president of Big Horn. Thereupon appellant filed a reply memorandum and some supporting documents, among which were a counter affidavit of its president and a copy of a lease between it and the United States. But the exhibits filed in this court in support of the motion for an injunction pending appeal are not before us on the merits of the appeal. The appellant cannot cure a fatal defect in its complaint by filing affidavits in this court after it has appealed.

Appellant contends that it gains standing to sue by virtue of the proceedings before the Department, to which proceedings it was a party and in which, it alleges, the Secretary conceded that its "legal rights would be invaded if Regulation 193.3 were violated." It cites language from the *Chicago Junction Case*, *supra*, as follows: "Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest." [11]

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[11] *Supra* note 4, at 268.

Restored to its context, the language quoted obviously does not support appellant's standing to sue. Four sentences earlier in the opinion, Mr. Justice Brandeis found that any party to a proceeding before the Interstate Commerce Commission had a statutory right to sue. And succeeding sentences in the same paragraph show that the implied finding of interest arose, not out of the fact of intervention *per se*, but because "leave [to intervene] can be granted only to one showing interest" and intervention had been allowed. Appellant here fails to invite our attention to any similar statute or
89 procedural rule applicable to proceedings and parties before the Department of the Interior. And no convincing reason is presented why the Secretary has, by permitting the company's "intervention", conceded its standing to sue. There were no formal "proceedings" with "parties"; at most, the Secretary was merely entertaining appellant's protests. There is nothing which warrants a holding that the Secretary is estopped to raise the claim, which he now strongly espouses, that there is no such standing.

The judgment of the District Court is

Affirmed.

EDGERTON, *J.*, concurs in the result.

90 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9704—January Term, 1948

[File endorsement omitted]

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

vs.

JULIUS A. KRUG, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Before: GRONER, *C. J.*, and EDGERTON and PRETTYMAN, *JJ.*

JUDGMENT—Filed March 29, 1948

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per MR. JUSTICE PRETTYMAN.

Dated March 29, 1948.

MR. JUSTICE EDGERTON concurs in the result.

91 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9704

[Title omitted]

[File endorsement omitted]

APPLICATION TO THE COURT TO MODIFY THE JUDGMENT—Filed April 9, 1948

It appearing that this Court concurred in the trial court's view as to standing to sue on the then status of the complaint, but refrained from ruling on the question of the legality or illegality of the threatened action because of a deficiency of allegation as to the lease in question:

> "The difficulty with the (appellant's) contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of Federal coal lands or indicate the nature, content or extent of any lease" (Page 2 of this Court's opinion).

It thus further appearing that this Court's affirmance is based upon the deficiency of the complaint as it existed at the time of dismissal and the District Court decision was based upon the complaint as it might have been amended by the allegation of the plaintiff's Federal lease, it is respectfully suggested that the Court incorporate any or several of the following alternative forms of relief in its mandate on the decision in this cause:

92 1. That the affirmance is subject to the condition of appellant being allowed five days after receipt of the mandate by the District Court to amend its complaint to include the lease.

2. That the affirmance is without prejudice to appellant amending its complaint accordingly within five days of the receipt of the mandate by the District Court.

With the further relief that the temporary injunction pending appeal issued in this cause on the fourth day of December, 1947, be continued until the District Court acts on appellant's amended complaint or its motion to amend.

(s.) T. PETER ANSBERRY,
(s.) STEPHEN J. MCMAHON, JR.,
Attorneys for Appellant.

Service acknowledged this 9th day of April, 1948.

(s.) ROGER P. MARQUIS,
Attorney for Appellee.

93 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

April Term 1948

No. 9704

[File endorsement omitted]

[Title omitted]

Before: Edgerton, Prettyman and Groner, JJ.

ORDER AMENDING THIRD PARAGRAPH OF JUDGMENT—Filed April 23, 1948

On consideration of appellant's motion to modify the judgment herein, it is ordered by the court that the third paragraph of the judgment of this court in this cause be, and it is hereby, amended to read as follows:

> On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court. Schaff v. R. W. Claxton, Inc., 79 U. S. App. D. C. 207, 144 F. 2d 532 (1944).

Per Curiam.

Dated April 23, 1948.

94-97 [Caption omitted]

98 DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., PLAINTIFF

vs.

JULIUS A. KRUG, DEFENDANT

Reporter's Transcript of Proceedings on Motion for Leave to File Amended Complaint—Filed July 12, 1948

Washington, D. C., Tuesday, June 15, 1948.

The motion was heard by Associate Justice F. Dickenson Letts in the Third Civil Division at 11:15 a. m.

APPEARANCES:

On behalf of the Plaintiff:
T. PETER ANSBERRY, and STEPHEN J. MCMAHON.

On behalf of the Defendant:
HOWARD S. BOYD, Department of Justice, and LEONARD NETSORG, Department of Interior.

99 PROCEEDINGS

THE CLERK: Sheridan-Wyoming Coal Company, Inc., versus Julius Krug, No. 4665-47.
THE COURT: Who brings this motion?
Mr. ANSBERRY: I do, Your Honor.
THE COURT: For the plaintiff?

ARGUMENT ON BEHALF OF PLAINTIFF

Mr. ANSBERRY: For the plaintiff.
If Your Honor will refer to the opinion of the United States Court of Appeals, which is rendered in this case and which is a part of the record before Your Honor; Your Honor will find that the Court of Appeals after a dismissal in the District Court before Mr. Justice Holtzoff last November granted a temporary injunction pending appeal, and then subsequently affirmed the dismissal on the ground that the plaintiff had failed to allege an essential fact, namely, that the plaintiff was the holder of the Federal co-lease, and that the regulation which the plaintiff asserts as being violated, was a part of that lease.

If Your Honor will refer to pages 2 and 3 of the Court's opinion, you will find that there are two questions involved in this case.

May I have your copy?

THE COURT: Thank you.

MR. ANSBERRY: One question is whether the issuance of the lease in question to the competitors of the plaintiff, the Big Horn
100 Coal Company, is illegal. The second question is, if it is illegal, whether the Sheridan-Wyoming Coal Company has any standing to sue.

There were three theories on that subject presented to the District Court of Appeals. The theory of the plaintiff was that if the competition itself was illegal, by that fact alone, we had standing to sue under this Chicago Junction case and related cases.

There was a second theory possible which has been adopted by the Court of Appeals, namely, that if the regulation complained of is a part of our lease, and if we have a Federal lease of coal lands, then we have reason for violating the regulation.

The third theory was the theory adopted by Mr. Justice Holtzoff, and it was this: no matter whether we had a lease or not; there was no standing to sue because the regulation was solely for the protection of the public and not for the protection of any particular class of people.

As a result of a misunderstanding, in the District Court, we had the fact of our lease before Mr. Justice Holtzoff as a part of our affidavit itself, and we did not feel it necessary to amend that because his theory was broad enough and an amendment would not have aided us in any respect.

Consequently, it went up without being amended to include our lease which we did not have at the time we drew the com-
101 plaint. We did not have it before us, as counsel. The Court of Appeals has now said, in effect, that had we pleaded the lease, we might have been entitled to prevail, and we moved the Court of Appeals to grant us permission to amend the complaint.

They took this action: they granted leave to Your Honor to permit the amendment, if in your judgment the interest of justice required that it should be amended. We feel this should be amended in order that we may reach the real controversy in the case, and not have it continue with this misunderstanding that occurred in the District Court.

As to whether the lease was before the District Court or not, that is a part of our case. So we ask Your Honor, first, to allow us to amend as of course, inasmuch as there has been no responsive pleading filed; therefore, we are entitled to amend as of course, and in the alternative, we should be granted leave to amend.

THE COURT: Did you amend once?

Mr. ANSBERRY: By interlineation, prior to the granting of the temporary restraining order. That was by order of the Court.

THE COURT: I thought I saw that there was an amended complaint filed.

Mr. ANSBERRY: We did file the complaint, Your Honor, on the theory that we might file as of course under Rule 15-A.

102 THE COURT: You do not mean to say you are asking to amend as of course the second time?

Mr. ANSBERRY: Inasmuch as the other amendment was by order of the Court, it became a part of our original complaint. This was done by leave of the Chief Justice. The first time that the defendant Krug saw the complaint, as it was, was when we went to the Court of Appeals.

THE COURT: Why would the Court of Appeals say that this Court must, as a matter of course, permit the amendment?

Mr. ANSBERRY: I assume that Your Honor would not wish to interfere with this Court on the matter of this Court's policy. We merely wish to extend our restraint because the minute it should expire, the defendant would give the lease to the Big Horn Coal Company which is not subject to the process of this Court, and the jurisdiction of this Court would be lost. The Court of Appeals has given restraint to us until ten days after the mandate reaches this Court.

THE COURT: I notice when you filed your amended complaint in giving notice to the attorney for the defendant, you said, "Notice of Filing Amended Complaint as of course." Doesn't that mean you were exercising your privilege under the rule?

Mr. ANSBERRY: That is correct, but that was opposed by the defendant.

THE COURT: I understand you still think that you are entitled to amend again as of course?

103 Mr. ANSBERRY: No. The amendment which Your Honor has before you is the only one which we have in mind. The amended complaint is dated sometime in May of this year.

Mr. McMAHON: May 25, Your Honor.

THE COURT: I see. That has not been allowed as yet.

Mr. McMAHON: We filed as of course, and the Clerk accepted it under 15-A. We then on the same day, because we had only ten days more of temporary restraint from the Court of Appeals, also filed a motion for leave to file that very amended complaint which we had already filed. We did that anticipating any possible objections on the part of the defendant's attorneys. They have objected to our filing of the complaint. They have also objected to our motion for leave to file an amended complaint.

THE COURT: Yes. All right.

Mr. ANSBERRY: We also, of course, are asking Your Honor for a preliminary injunction to further restrain the issuance of this lease.

THE COURT: I think we better consider this motion to amend.

Mr. ANSBERRY: I have very little to say on the subject except that the real controversy in the case has not been reached because under the law as the Court of Appeals has laid it down in their opinion, the Court of Appeals in amending their mandate pursuant to our motion referred to the Schaff case which Your Honor
104 may recall was a case in the District Court they held in an automobile negligence case that a man was not responsible for having left his car unlocked. There was a later Court of Appeals decision in another case which made that negligence, with the result that the Court of Appeals in the Schaff case reversed and remanded with instructions to permit an amendment of the case to state that the car was left unlocked. So we are in a situation where the District Court fits a somewhat different view of the law than the Court of Appeals has now expressed.

We also had a different view of the law. Now we want to amend to the law the Court of Appeals has laid out for us in this opinion. That is all at the moment.

ARGUMENT ON BEHALF OF DEFENDANT

MR. BOYD: If your Honor please, it is our position that first, the plaintiffs have no right to amend as of course.

Secondly, that they ought not be given leave to amend. Their argument about having the right to amend as of course comes to this: when a complaint is filed in this court, and the motion to dismiss is made and sustained by this Court, and the judgment of this Court dismissing the complaint is affirmed by the Court of Appeals; then under the rules, they may amend the complaint and start the litigation all over again. We submit that that is a preposterous construction of the rules.

105 Under those circumstances, that is the only possibility of amendment.

THE COURT: Did the Court of Appeals give any directions as to that situation?

Mr. BOYD: The Court of Appeals order provides that this court shall have—perhaps I better read the whole thing:

> "On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems

proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court."

So there is no direction to the court except to hear and entertain a motion for leave to amend.

We contend, of course, that with that mandate of the Court of Appeals, this court does have the power and duty to entertain
106 a motion, but not to grant a motion for leave to amend.

We submit that the motion for leave ought to be denied as a matter of sound public policy. There are no supervening facts. There is no new law. There is nothing new here that is being offered. There is nothing that the plaintiffs did not have at the time the suit was originally brought. It is suggested that plaintiff's counsel did not have before them a copy of the lease from the United States which they now undertake to assert, at the time the suit was brought. However, it is not suggested that they did not have full information about that lease at least when the motion to dismiss was sustained. Nevertheless, when the motion to dismiss was sustained, they did not ask leave to amend then.

Had they done so, and had there been any substance to the theory which they now seek to advance, the amendment could have been allowed. Then when the appeal was taken, the whole case could have been disposed of. Instead, they went to the Court of Appeals on the single theory that they had chosen to take.

We submit that litigants ought not to be encouraged to try their cases in pieces and have their cases going up to the Court of Appeals, then back to this court, and then back again to the Court of Appeals and perhaps amended again after that.

In addition, we submit that leave to amend ought not to be granted because the proposed amendment will not change
107 the result. There is no substance, whatever, to the contention which they are urging on the merits.

Their position is this: we, the plaintiff, have a lease of federally-owned coal lands. We received that lease sometime in the early 1940's. At the time we received that lease, there was a regulation promulgated by the Secretary of the Interior which stated that as a matter of policy, the Department of Interior would not grant coal leases until there was a showing of need for the coal to be produced under the lease which was sought.

It is charged in this amended complaint that plaintiff relied upon that regulation. They say that the Big Horn Coal Company, which is the prospective lessee, has not made such a showing as that, and that the Secretary has not made findings that its production

on the Federal land is necessary to supply the needs of the community which it serves.

They make other charges that there is a failure by the Secretary to comply with that in full. But it is perfectly plain that the Secretary can change his regulations whenever he deems it wise to do so. The fact that a regulation was in force in 1943, and that this plaintiff sought and obtained a lease, does not tie the hands of the Secretary and strip him of the statutory rights which promulgate the reasonable and proper regulations.

The case they tried to make is that since he, the Secre-
108 tary had promulgated a regulation 1, and they, the plaintiffs, had a lease when that regulation was in force, that thereafter that regulation is a part of their contract of lease, and that the Secretary of the Interior cannot alter, amend, change or disregard that regulation.

The way they tried to put that regulation into the lease is by pointing to a provision of the lease which, in substance, is that if plaintiff does not comply with existing regulations, the lease may be cancelled. It says nothing, whatever, about the Secretary's being bound to keep the existing regulations in force without change. It says nothing, whatever, about the plaintiff's being entitled to rely upon a continuation of those regulations unchanged.

We submit that such a provision in the lease gives them no standing to sue, whatever, when the Secretary, in his judgment, under valid statutory authority undertakes to grant a lease to the third party, one will simply continue to compete with the present plaintiff.

The only damage they suggest is that they are threatened with his continued competition.

What this suit is really, is an effort by the plaintiff to strangle a competitor and to put the competitor out of business if they can. That appears quite plainly from the nature of the action and from the charges of the complaint. We submit that lawful com-
109 petition, and this is lawful competition, is not a basis for any suit. It has been said to Your Honor that the Court of Appeals include this theory. The Court of appeals expressly refused to pass upon it. The Court of Appeals said the record did not contain any allegations about this lease. It appears only in an affidavit submitted to us in connection with an application for an injunction. Therefore, it is not before us, and we do not decide anything about it. It is for the District Court to decide.

We submit there is no merit to it whatever. It has not been approved by the Court of Appeals. If the amended complaint is permitted to be filed, it will not change the result one iota. It will simply have to be dismissed again. We submit that lease if filed should be denied.

THE COURT: Assuming that you are permitted to amend, what do you say to the other motion which I believe is for preliminary injunction?

CLOSING ARGUMENT ON BEHALF OF PLAINTIFF

Mr. ANSBERRY: Your Honor, that brings us to the matter which has been discussed by Mr. Boyd.

This lease is Buffalo No. 037167.

> "This indenture of lease, entered into, in quintuplicate, this 24th day of December A. D. 1943, by and between the United States of America, and in this behalf by the First Assistant Secretary of the Interior, party of the first part, hereinafter called the lessor, and Sheridan-Wyoming
> 110 Coal Company, Inc., of Monarch, Wyoming, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the Act of Congress, approved February 25, 1920 (41 Stat. 437), entitled 'An Act to Promote the Mining of Coal, Phosphate, Oil, Oil shale, gas, and Sodium on the public domain,' hereinafter called the 'Act.'"

So the lease is subject to the Mineral Leasing Act. This regulation 193.3 was issued pursuant to specific authority in the Mineral Leasing Act for the issuance of regulations.

It has been held previously in the case of Hodgson versus the Midwest Oil Company, that these regulations issued by the Secretary of Interior, have the force and effect of a statute; they become a part of the statute. Moreover, since this regulation, 193.3 was promulgated in 1934 by the Secretary of Interior, the Mineral Leasing Act has been reenacted several times. So, there, we have a Congressional reenactment of the regulation, and we assert that this first paragraph of the lease makes the regulation 193.3 part and parcel of the lease. In any event, since that regulation has the force of statute, it is like all relevant statutes, a part of any lease that is entered into under the statute.

The very purpose of the regulation itself was to prevent unnecessary and damaging and harmful constitution to Federal coal lands.

> It was issued at a time when the coal industry all over the
> 111 United States was in very bad shape. As Your Honor will recall, there was bloodshed and violence and trouble. The regulation, however, has an open-up clause; that is, if anyone can show need for a new coal demand on the part of the consumers of the area they propose to serve, they will be allowed a Federal lease.

In this case, there has been expensive litigation before the Department of the Interior. The Department of the Interior has been unable to find that there is consumer need for the production of

cited were so far removed from this case that it was impossible to distinguish them except by saying that they have no application.

At the hearing before Mr. Justice Holtzoff, I did not object to the arguments they presented. I do not understand that counsel had the right to object to arguments to the court. I can object to the introduction of evidence and improper argument to the jury, but counsel can present what argument he pleases without interruption by opposing counsel. I do not understand it to be the duty of opposing counsel to bring the errors to the attention of his opponent. They simply failed to plead the lease as the Court of Appeals held they did. That is why the Court of Appeals refused to consider it when the case was brought there.

If Your Honor is considering the granting of leave to file and perhaps an injunction, I wish to bring this fact to your attention: Big Horn Coal Company, which is the real party in interest, has informed me through its counsel that it wishes to be heard and perhaps to intervene in this action to oppose the granting of injunction if that is within the contemplation of Your Honor.

THE COURT: I will take the papers, gentlemen, and see what I make of them. I will take it under advisement.

120 MR. MCMAHON: Your Honor, we would like to make an additional motion in open court in the event that Your Honor takes it under advisement to the effect that we move for a temporary injunction, a preliminary injunction, pending an opportunity for us to go to the Court of Appeals in the event that the preliminary injunction is denied by Your Honor or in the event that the amendment of the complaint is disallowed by Your Honor.

THE COURT: That suggestion is not timely.

MR. ANSBERRY: No, but the Court of Appeals' restraint expires in two days. If Your Honor should not conclude his deliberations before that time, there is a risk of losing jurisdiction.

THE COURT: It expires two days from now?

MR. MCMAHON: Yes, Your Honor.

THE COURT: I think it should be continued until I have acted. Do you agree to that, Mr. Boyd?

MR. BOYD: To the entry of such an order? While Your Honor has it under consideration, we must consent.

THE COURT: You may prepare such an order.

(At 11:45 a. m., the hearing was concluded.)

121 Reporter's Certificate to foregoing transcript omitted in printing.

122 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED PLEADING—Filed May 25, 1948

To: Ralph S. Boyd, Attorney for Defendant, Room 2131, Department of Justice, Washington, D. C.

Please take notice that we have this day filed a motion before the District Court of the United States for the District of Columbia for leave to file an amended pleading and have requested that an oral hearing be held thereon in the forenoon of Tuesday, June 1, 1948, at 10 o'clock or as soon thereafter as counsel may be heard.

A copy of said amended complaint together with additional Exhibits H through K has already been served upon you the 25th day of May, 1948.

Please take notice that supporting points and authorities are served herewith and the local rules of court provide that opposing points and authorities must be served within five days or such further time as the court may grant.

Dated: May 25, 1948.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

123 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED PLEADING—Filed May 25, 1948.

Comes now the plaintiff herein and in addition to the filing of its amended complaint as of right in this cause the 25th day of May,

1948, moves this Honorable Court for leave to file said amended complaint.

The grounds for such motion are:

1. That the defendant may erroneously oppose the filing of said amended complaint as of course;

2. That a temporary injunction pending appeal granted by the Court of Appeals on December 4, 1947 was extended by that Court until ten days after the mandate of that court was filed in this court on May 25, 1948:

3. That justice so requires in order that all issues between the parties may be fully litigated in this action, and that plaintiff be given an opportunity to correct the defects in its original complaint, dismissed by order of this Court on November 17, 1947; and

124 4. That the third paragraph of the Judgment of the Court of Appeals (App. D.C. #9704, decided March 29, 1948) grants leave to this Court to entertain such motion.

The amended complaint is substantially the same as the original complaint filed in this cause on November 4, 1947, except for:

1. The first section thereof (pages 1 through 3 of the amended complaint) which has been substantially amended, and

2. Exhibits H through K, which have been added thereby, and which are also attached thereto.

Plaintiff requests an oral hearing upon this matter before a Justice of this Court at 10 o'clock in the forenoon of Tuesday, June 1, 1948, or as soon thereafter as counsel can be heard.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

Service of a copy of the foregoing motion is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

125 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDED COMPLAINT FOR AN INJUNCTION—Filed May 25, 1948

The plaintiff for its complaint herein states to this Honorable Court as follows:

First. (a) The Sheridan-Wyoming Coal Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Monarch, Wyoming. It is engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states, to-wit, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri.

(b) That a valid and lawful regulation of the United States, now known as Regulation 193.3., F. C. R. 43, was promulgated and published on February 1, 1934, under the Mineral Leasing Act of 1920 as amended, and has become a part of the Mineral Leasing Act. A copy of said regulation is attached hereto and made a part hereof marked Exhibit F.

(c) That throughout the entire existence of said regulation, since the date of its promulgation over fourteen years ago, defendant and his predecessors in office have not issued a single coal mining lease without a showing and a finding of the requisite need
126 for an additional mine under said regulation; and that even since as recently as March, September and December of 1946, he has denied several leases because the required finding could not be made. Copies of these decisions, which the defendant has conceded represent the heretofore uniform rule of all such previous decisions under said regulation, are attached hereto and made a part hereof, marked Exhibits G, H, and I.

(d) That Sheridan-Wyoming Coal Company, plaintiff herein, holds and has held a contract of lease from the United States under said Mineral Leasing Act, described as Buffalo 037167 "N" dated September 24, 1943, copy attached hereto as Exhibit J, and made a part hereof, and that said lease is in full force and effect and plaintiff has fully complied therewith.

(e) That, under the terms of said lease, plaintiff was required to make an investment in "actual mining operations, development or improvements" of at least $60,000; that plaintiff, in reliance upon

the Regulation, has made and duly reported to the lessor expenditures in compliance with the lease totalling $1,352,314.50 in the four years ended September 30, 1947; (these expenditures included at least $110,000 in new mechanized underground mining equipment, and other large but unsegregated expenditures in cutting thirty entries during the year ended September 30, 1944); that as a result thereof plaintiff mined in excess of 1,300,000 tons of coal from the leased land and paid royalties thereon to the defendant and his predecessors, and that plaintiff will lose a large but unascertained portion of its investment over and above $3,000.00 which is non-recoverable, in the event that the defendant should violate said regulation by issuing coal leases described as Buffalo numbers 037885 and 039466 to the Big Horn Coal Company, which he now imminently threatens to do.

127 (f) That plaintiff entered into said lease and made the above investment in reliance upon the terms of said regulation and the heretofore uniform custom, practice, and usage established by the defendant and his predecessors in office and their other officers, servants, and employees in denying leases which violated the requisites of Regulation 193.3.

(g) That when plaintiff entered said contract of lease, the terms of said Regulation and the heretofore uniform custom, practice and usage thereunder established by the defendant and his predecessors in office and other officers, agents, servants, and employees, was a part of the consideration it bargained for and obtained.

(h) That the Big Horn Coal Company of Sheridan, Wyoming, has been a competitor of the plaintiff and has been engaged in the mining and distribution of coal from state lands since it applied for certain Federal coal leases hereinafter more fully referred to, while awaiting the granting of said Federal coal leases; and that its mines are located approximately seven to fifteen miles from the mines of plaintiff in and around Monarch, Wyoming; and that both companies are the only producers of a certain low grade type of coal known as Sheridan area coal, the marginal nature of which, in combination with transportation expense, confines its distribution by both companies to approximately the same markets and the same types of customers. Attached hereto and made a part hereof is a graph marked Exhibit K, prepared from official sales figures showing the effect of the Big Horn Coal Company upon the market for Sheridan area coal.

Second. The defendant is the duly qualified Secretary of the Interior of the United States, holding unto himself certain powers, duties, and trusts thereunder and only by virtue of his office thereunder.

Third. This case arises under and by virtue of the laws of the United States, including the Act of June 11, 1946, 5 U. S. C. 1002, the Act of February 25, 1920, 30 U. S. C. 189, 201 et seq., and the Act of June 25, 1910, 43 U. S. C. 141 and regulations issued thereunder, more particularly Sec. 193.3 of Title 43, Federal Code
128 of Regulations. The amount in controversy exceeds $3000, exclusive of interest and costs.

Fourth. On January 24, 1934, the defendant's predecessor in office caused to be issued certain directive orders in letter form having the force and effect of statute, effectively withdrawing all public coal lands for coal leasing purposes except that certain public coal land for which could be shown an actual need which could not otherwise be reasonably met. Excerpted copies attached hereto and made a part hereof marked Exhibit A and Exhibit B.

Fifth. On January 6, 1944, one, the Big Horn Construction Company assigned its coal lease running from the State of Wyoming to one, the Big Horn Coal Company. This lease was dated December 2, 1943, although the cognizant officers of the State of Wyoming did not approve it until February 3, 1944. During the month of December, 1943, the Big Horn Coal Company

(a) began construction and development of their new mine on their State land,

(b) perfected their incorporation, and

(c) filed applications for a lease of adjoining Federal coal lands on the ground that such Federal land was necessary to the commencement of their new mine.

All three acts enumerated as a, b, and c above were made in concert and therefore necessarily part and parcel of each other.

Sixth. When the pendency of the Big Horn applications became known to the within plaintiff it filed protests against the issuance of the leases by the defendant to the said Big Horn Coal Company.

129 *Seventh.* On October 2, 1945, the defendant through the Undersecretary of the Interior, the Hon. Oscar L. Chapman, held a hearing at Denver, Colorado. At said hearing the Big Horn Coal Company urged its right to have defendant grant its application and award it a coal lease despite the aforementioned Regulation 193.3, Title 43, Code of Federal Regulations. The within plaintiff urged the disallowance of any award of said lease to Federal coal lands under said Regulation 193.3. Briefs and oral arguments were received from both the applicant Big Horn Coal Company and the within plaintiff.

Eighth. Some two years after the Big Horn Coal Company had first filed its lease application, the defendant, pursuant to legal requirement, published notice that for coal leasing purposes, he would receive offers and protests thereto on this same Federal coal land covered by the Big Horn application.

Ninth. On January 16, 1946, the Big Horn Coal Company offered to lease these public lands at a certain fixed rental. Such offer was not accepted by the defendant because of the aforementioned protests which were filed by the within plaintiff prior thereto. For this reason the defendant did not then make an award of the lease to the Big Horn Coal Company.

Tenth. On April 10, 1947, the defendant through his Director of the Bureau of Land Management, Hon. Fred W. Johnson, issued a certain writing denominated decision. Said decision contained the following:

(a) A conclusory and inferential attempt to make a finding of an old mine from a recital of so called hardship.

130 (b) Probative findings of fact which would necessarily compel as a matter of law a finding of a new mine.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need.

A copy of said decision is attached hereto and made a part hereof, marked Exhibit C.

Eleventh. On July 29, 1947, the defendant through his Undersecretary of the Interior, the Hon. Oscar L. Chapman, issued a writing denominated "Motion for Rehearing" which the within plaintiff had previously filed. Said decision contained the following:

(a) A reversal of the implicatory finding of an old mine previously made by the decision of April 10th although it reiterated the recital of so-called hardship in connection therewith.

(b) A finding that Big Horn was a new mine although a large and going one.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need although it expressed the possibility that the within plaintiff and the Big Horn Coal Company could possibly exist.

A copy of the dismissal of said motion for rehearing is attached hereto and made a part hereof, marked Exhibit D.

Twelfth. On October 22, 1947, the defendant issued a certain writing denominated "Motion for the Exercise of Super-
131 visory Power." Said writing dismissed such motion which had been made previously by the within plaintiff. Said writing contained the following:

(a) An inferential restatement of the previous finding of a new mine in the denial of the motion for rehearing of July 29, 1947, and a repetition of the large going business finding.

(b) Probative findings of fact of a new mine by reference to the decision dated April 10, 1947, which would as a matter of law compel the finding of a new mine.

(c) A total omission of any finding that the coal to be mined from the Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need and complete elimination of the reference made in the dismissal of the "Motion for Rehearing" to a possibility of both mines existing.

A copy of said writing of October 22nd is attached hereto and made a part hereof, marked Exhibit E.

Thirteenth. Plaintiff further alleges that the within defendant is granted only restricted power and authority under the aforementioned Regulation 193.3 thereby limiting his discretion to grant a lease in the premises only upon the conditions that an applicant show a meeting of the criteria or requisites of Regulation 193.3. Therefore any issuance of Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company would be void and illegal because

(a) there has been no finding of the regulatory requisites, and

(b) there could be no finding of the regulatory requisites in the premises.

132 *Fourteenth.* Plaintiff further alleges that the effective withdrawal orders issued January 24, 1934, by the defendant's predecessor in office were the effective exercise through a proper officer under law of both the power and authority conferred by 43 U. S. C. 141, and the inherent withdrawal power and authority conferred by virtue of his office, withdrawing both formally

and informally the public land covered by the Big Horn lease applications, Buffalo Nos. 037885 and 039466 in the premises.

Fifteenth. Plaintiff further alleges that it is within the protected class established by the aforementioned Regulation 193.3 having the force and effect of statute.

Sixteenth. Plaintiff further alleges that the imminent threatened issuance of Buffalo leases Nos. 037885 and 039466 will irreparably and wrongfully damage to a large but unascertainable extent over and above $3,000.00, the business and trade of plaintiff in violation of the very manifest purpose of Regulation 193.3. Plaintiff alleges that it has already suffered loss of markets, loss of sales, loss of customers, loss of trade, and loss of profits resulting from the Big Horn Coal Company's operations on non-Federal lands. The granting of the aforementioned leases to the Big Horn Coal Company for its operation on Federal lands would result in irreparable damage in that further loss of markets, sales, customers, trade and profits, through increasing Big Horn's limited reserve, would result in an appreciable although unascertainable amount not readily compensable in damages, of an amount over and above $3,000.00. The issuance of said leases would impair plaintiff's entire business. For which reason plaintiff has no plain or adequate remedy at law. On information and belief the aforesaid contracts of lease are about to be executed and delivered by defendant to a foreign corporation which cannot be served in the District of Columbia with process in respect of such lease claimed by plaintiff to be illegal and in violation of its rights.

133 WHEREOF, the plaintiff prays:

(a) That this Court issue its temporary restraining order against the within defendant, his agents, deputies, employees and all persons acting in concert or participation with him or under his direction, enjoining and restraining them from issuing, signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company of Sheridan, Wyoming.

(b) That upon the hearing of motion for a preliminary injunction that the Court continue the temporary restraining order in effect as a preliminary injunction.

(c) That upon final hearing the Court permanently enjoin the defendant, his agents, deputies, employees, and all persons acting in concert or participation with him from issuing or attempting to issue, or signing, causing, suffering, or permitting the issuance of the aforementioned coal mining

leases Buffalo Nos. 037885 and 039466 to the Big-Horn Coal Company.

(d) That upon final hearing this Honorable Court may grant the plaintiff such other, further and different relief as may to the Court seem proper and just in the premises.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

134 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF FILING AMENDED PLEADING AS OF COURSE—Filed May 25, 1948

To: Ralph S. Boyd, Attorney for Defendant, Room 2131, Department of Justice, Washington 25, D. C.

Please take notice that plaintiff is filing an amended complaint as of course, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure on this the 25th day of May, 1948, a copy of which, together with additional Exhibits F through K, is served herewith.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

Service of a copy of the foregoing notice is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

135 [Verification omitted]

136 EXHIBIT "A"

EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE DIRECTOR OF THE BUREAU OF GEOLOGICAL SURVEY.

"The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.

It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437), and from the interpretation given to Section 13 of that act, relating to oil and gas, by the Supreme Court in the case of *United States* v. *Wilbur* 9283 U. S. 414, that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the operation of the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need for coal which cannot otherwise be reasonably purchased or obtained is shown.***

Hereafter the offering of coal lands for lease by competitive bidding or the granting of prospecting permits should not be recommended unless you have reliable information that there is an actual need for coal which cannot otherwise be reasonably met."

137 EXHIBIT "B"

EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

"In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained.***

It is advisable that you in the first instance require lease applicants to show fully the need for additional production of coal."

138 EXHIBIT "C"

Decision

April 10, 1947

BIG HORN COAL COMPANY—Coal

Protest Dismissed. Evidence Required.

After due publication coal lease Buffalo 037885, embracing S½ sec. 31, T. 58 N., R. 84 W., 6th P. M., Wyoming, was offered at public auction at 10 a.m. on January 16, 1946. The original applicant, Big Horn Coal Company, was the only bidder to appear. Rental for the first lease year was tendered and a receipt issued. Under such circumstances, other things being equal, the right to a lease would have been awarded to that company at that time. However, in view of a number of protests filed prior to the auction date, no award was made.

The lands included in the Big Horn's coal lease application Buffalo 039466 (6th P. M., Wyoming, T. 57 N., R. 85 W., sec. 1, lot 4, SW¼NW¼, sec. 2, lot 1, SE¼NE¼; T. 58 N., R. 85 W., sec. 35, E½SE¼) have been found to be subject to lease but beyond that no action has been taken in the case, since the protests above noted were leveled against this application as well.

At present the Big Horn's coal properties are held under state lease.

The protests are numerous but of even tenor, several in fact being exact duplicates of one another. They are concerned primarily with two propositions: that proper application of section 193.3 of Title 43, Code of Federal Regulations, prohibits issuance of either lease and that strip mining as a form of enterprise is uneconomic and wasteful.

The regulation referred to (43 CFR 193.3) was adopted for the purpose of preventing ruinous competition in the coal industry within public land states and provides that leading units will be segregated and auctions authorized only upon "a satisfactory showing that an additional coal mine is needed and there is an actual need for coal which cannot otherwise be reasonably met." Protestants raised two issues in this connection: the Big Horn's lack of need for additional reserves and the absence of public need for an additional mine in the area concerned.

Apparently the initial stand with respect to adequacy of reserves has been abandoned in favor of a contention that the company opened its mine on state lands "with known inadequate reserves" in an effort to circumvent the provisions of the regulations cited. See page 17 of protestant's brief filed November 14, 1946, following the Denver hearings of October 2, 1946.

139 This office will not countenance any deliberate attempts to circumvent the above quoted regulation. The opening of a

mine on non-public lands only after an application has been filed for a lease on adjacent public land, will not, where such action is taken to effect the circumvention noted, be recognized as vesting any rights on which the granting of the lease may be based. However, the existence of such bad faith will not be presumed in the absence of clear proof thereof. In this instance, the Big Horn Company has alleged its complete bona fides and it is not believed that the evidence submitted by the protestants is sufficient to establish the contrary.

As to the question of need for an additional mine, it has long been established that Section 193.3 does not apply in cases where Federal leases seek additional lands as a reserve against imminent exhaustion of workable deposits in an existing mine. (Sec. 43, C. F. R. 193.15). The principle is the same whether that mine is on Federal, state or privately owned lands. The regulation was not intended to be and will not be invoked to drive a going concern out of business.

In the instant case, *the usual criteria for determining the need for a new mine* under section 193.3 do not apply because, at the time the Big Horn applications were acted on by the Department and the lease offered at public auction, that company was an active existing mine with a large annual production, and because of the further circumstances that (1) the Big Horn Company has been in operation for about three years and the evidence fails to disclose that its operation has jeopardized the continuance of the competing Sheridan-Wyoming mine (2) both companies apparently serve customers over a very large area embracing several states in which there are numerous other active mines, (3) both companies produce a type of coal which is not readily storable and which has limited uses.

Since this Department, by receiving Big Horn's application and acting favorably upon it, has encouraged that company to expand its means in the opening of a mine, it has the duty of issuing a lease unless it is shown that the company has acted in bad faith or that its operations have resulted in serious curtailment of Sheridan-Wyoming's production. The protestants have failed to establish either of these propositions as a fact. In addition, they have failed to show that strip mining is uneconomical and wasteful.

The protests are dismissed. This decision will become final 30 days from service of notice.

The Big Horn Coal Company is awarded the right to a lease under serial Buffalo 037885 and is granted 30 days from notice in which to file (1) the five attached lease forms after proper execution thereof, including initialing by the signing officer of the rider attached as section (2) (j) the fissionable materials reservation at the bottom of page 2, and the fair employment practices stipula-

tion stamped at the top of page 3, (2) a $10,000 corporate surety bond on or substantially in conformity with the attached form, and (3) its consent to accept a lease under its application Buffalo 039466 if offered at public auction at a minimum bonus of $10 per acre, subject to a royalty of 10 cents per ton, mine run, a minimum investment of $20,000 during the first three lease years, a minimum annual production of 10,000 tons, commencing with the fourth year of the lease, and the furnishing of a $10,000 bond, which
140 bond may be reduced to a minimum of $7,500 after the investment requirement has been met, to assure proper conditioning of the pit and to protect the remaining coal deposits on the land included in the application and adjacent land.

Failure to file the lease forms and bond required under 037885 will result in setting aside of the award and rejection of that lease application. Failure to submit the consent required under 039466 will result in rejection of that application.

The parties have a right to move for rehearing within the 30-day period prescribed above. (43 C. F. R. 221.81)

The district land office will serve notice hereof on the Big Horn Coal Company, Sheridan-Wyoming Coal Company, United Mine Workers of America, United Mine Workers Building, Washington, D. C., Local 230 of the United Mine Workers of America at Monarey, Wyoming, Montana Coal Operators Association, P. O. Box 1498, Billings, Montana, Coal Producers Association of Washington, 2010 Smith Tower, Seattle 4, Washington, Southern Wyoming Coal Operators Association, 704 Boston Building, Denver 2, Colorado, Utah Coal Operators Association, 709 Tribune Telegram Building, Salt Lake City 1, Utah, Rocky Mountain Coal Mining Institute, Equitable Building, Denver, Colorado, and Colorado and New Mexico Coal Operators Association, 814 Boston Building, Denver 2, Colorado.

Apr. 10, 1947 FRED W. JOHNSON,
Director.

Subject to the Department's consideration and disposition of motions for rehearing by the protestants under 43 CFR 221.81, the recommended conclusion that a lease be issued to the Big Horn Coal Company is Approved:

(sgd.) OSCAR L. CHAPMAN,
Under Secretary of the Interior.

141 EXHIBIT "D"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary—Washington

A-24645 July 29, 1947

"N"

Big Horn Coal Company, applicant: Buffalo 037885, 039466.

Sheridan-Wyoming Coal Company, et al., protestants: Protests against application for coal lease dismissed.

Motion for rehearing denied.

Motion for Rehearing

On April 10, 1947, the Department approved a decision of the Bureau of Land Management which dismissed the protests of Sheridan-Wyoming Coal Company and others against the granting of the application of the Big Horn Coal Company for a coal lease for certain lands in Wyoming. A motion for rehearing has been filed by Sheridan-Wyoming Coal Company, Coal Producers' Association of Washington, Montana Coal Operators' Association, Utah Coal Operators' Association, and Colorado and New Mexico Coal Operators' Association.

The record in this proceeding is relatively voluminous. Before the protests were dismissed, a hearing was held. Numerous exhibits, affidavits and counter-affidavits have been filed touching upon the details of innumerable matters, some of which are of questionable relevance. The entire matter, however, revolves, as all seem to agree, around the application of the following regulations of the Department:

> "The General Land Office[1] will make favorable recommendation that leasing units be segregated and that auctions be
142 authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." 43 CFR 193.3.

In essence, the protestants moving for rehearing contend that this is a case where a new coal mine has been opened which proposes to supply bituminous coal of a type, quality, kind and size which will tend to supplant in competitive market areas the coals which they have been shipping. The applicant denies this and asserts that it

[1] Now the Bureau of Land Management.

has a mine in operation and merely seeks additional lands in order that its mine may not be forced to close for lack of coal reserves.

The present operation of the applicant is conducted on sec. 36, T. 58 N., R. 85 W., Sheridan County, Wyoming. This land is apparently owned by the State of Wyoming. In 1941, Isaac Turner procured from the State a coal lease for sec. 36. Through a stripping operation employing a tractor and scraper, Turner produced a modest tonnage, some of which he hauled in his three trucks to the truck tipple of another mine for sale to truckers for resale and part of which he hauled directly to nearby consumers. In December 1942, the tractor and other equipment of the Turner mine were destroyed by fire and when Turner was unable to meet his commitments to the State, his lease was terminated.

Thereafter, on December 2, 1943, the persons interested in the Big Horn Coal Company procured from the State a coal lease.[2] On December 18, 1943, the prospective Big Horn Coal Company, then being incorporated, filed an application for a coal lease
143 of certain government lands adjoining sec. 36, and on December 21 submitted copies of its articles of incorporation showing it had come into existence on the preceding day. On August 24, 1945, the company applied for additional lands.

The Big Horn Coal Company commenced production in sec. 36 in February 1944, with 390 tons. This was followed by 34 tons in March, no tonnage in April, and then a constantly mounting tonnage for the remainder of the year so that total production for the year 1944 on a run of mine basis totaled 107,201 tons. For the year 1945, its production jumped to 264,722 tons and in 1946 it reached 483,576 tons.[3]

Harking back to the events of December 1943, the protestants cite the quoted departmental regulation. They assert that Big Horn started a new mine on sec. 36 with the full knowledge that the coal deposits were inadequate; that the company merely used the lease on the state land for the purpose of avoiding or evading the clear intendment of the departmental regulation. Big Horn, of course, takes the position that it assumed the operation of an existing mine

[2] The lease ran to the Big Horn Construction Company, because the Big Horn Coal Company was still in process of formation. As soon as it was formed, the lease for sec. 36 was assigned to it.

[3] These tonnage figures were obtained from reports filed by Big Horn Coal Company in the regular course of its business with the State Board of Equalization of Wyoming. Copies of the reports for the calendar years 1944 and 1945 comprised part of protestants' Exhibit 3, introduced at the hearing. A certified copy of the return for the calendar year 1946 was furnished to the Department directly by the Board at the request of the applicant.

and filed its application with the United States for the purpose of acquiring additional deposits to serve a mine already in existence.

Without attempting a definition of a mine, it seems clear that Big Horn did not simply continue the operation of the Turner mine. In essence, a new mine was created. Whereas the Turner mine had an insignificant production sold mainly to truckers over the
144 truck tipple of another mine, Big Horn launched into large production, installed new and modern equipment, including a large fleet of trucks for hauling coal to rail loading facilities, and constructed a new highway from its pits to a rail siding where it built a tipple capable of handling its tonnage for rail shipment. The Turner mine had served small local consumers and truckers who operated within the economic limits of the truck haul; but the Big Horn mine converted to shipments by rail and served large consumers of coal at distances far beyond those which could be reached by the trucked production of the Turner mine. True, both operations were of the stripping variety and both were conducted on the same section of land. But it is clear that the Big Horn operation was not a continuation or mere expansion of the Turner mine, either in terms of law, technology, or of economics. The Big Horn mine, a large rail shipping operation with new, modern equipment, happened to undertake production on the same land where formerly there had been a relatively tiny operation which shipped its modest tonnage to those who would buy or burn its products in the vicinity. It does not appear that the size, methods of mining, equipment used, mode of shipment, or consuming areas served were influenced by the happenstance that the Turner mine had once operated on the same land. In these circumstances, it cannot be said that the Big Horn Coal Company did not open a new mine on the state land. Thus, if consideration of this matter were to be limited to the events of December 1943, it would follow that the requested lease would not issue.

Thus to limit consideration of this case, however, would be to ignore events subsequent to December 1943. The facts are that since December 1943, without encroaching on federal lands,
145 the Big Horn Coal Company has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business. It would accommodate the expansion of an existing mine which is running out of coal reserves.

Such an application would not run counter to the regulation quoted above. The leading case interpretative of the regulation, and it has been strongly relied upon by the protestants at all stages of this proceeding, is *Carl T. Olson*, —— I. D. —— (A-24226, decided March 25, 1946), rehearing denied December 19, 1946. Olson had

applied for a lease for certain lignite lands. An investigation revealed that Olson proposed to open a new mine on federal lands to supply a market already adequately served by existing mines. In the course of its decision which denied the application, the Department noted that the quoted regulation was based on a "* * * policy founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest." Both the public interest in the maintenance of a healthy bituminous coal industry and the interest of the government in the conservation and fruitful exploitation of its mineral properties were cited as reasons for sustaining the policy behind the rule. And Olson's application was rejected.

But the Department was also careful to note that its position "* * * as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot through this method alone enable the industry to
146 elude the press of natural economic forces." In the *Olson* case, as in cases which have followed it,[4] there was no question concerning the expansion of an existing, operating, going mine. In none of those cases had there been any substantial investment made in connection with operations on non-federal lands. None of them involved a situation where under leases issued by a State government, a mine operator had obtained markets, acquired customers, and established valuable good will, where machinery and equipment had been acquired and were being used currently in the business of mining a large tonnage of bituminous coal.

Thus, while the Department in the interpretation and application of its regulation has endeavored to prevent the creation of conditions of excessive competition, it has not undertaken to remove competition already established. To do so, as in this case, would result in the loss of individual investments in the mines to be closed. It would drive a mine out of business not because of poor management, or high cost of operations, or inability to meet competition in the market place, but because successful conduct of its business forced it to turn to federal lands for additional coal reserves. There is no good reason why the operator whose mine is on or adjacent to federally owned lands should for that reason alone be placed at a disadvantage in conducting and maintaining his business, or, conversely, why the operator of one mine should be accorded an advantage over another operator merely because, as a conse-
147 quence of successful operation, the latter needs coal deposits of the United States. As stated in the *Olson* case, the Depart-

[4] See Lyman Ray Cox, A-24405 (September 3, 1946), unreported; Andrew Mancotes, —I. D. — (A-24489, March 17, 1947); Frank Lilly, A-24582 (June 3, 1947), unreported.

ment will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise.

Further, the purpose of the rule is to assist in keeping in operation mines already in existence. To apply the rule as proposed by protestants would certainly and definitely close the Big Horn operation. On the other hand, to grant a lease to Big Horn leaves open the possibility of continued existence of both the applicant and its present competitors.

The motion for rehearing is denied.

(S.) Oscar L. Chapman,
Under Secretary of the Interior.

148 EXHIBIT "E"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary—Washington

A-24645 October 22, 1947

"N"

Big Horn Coal Company, applicant: Buffalo 037885, 039446.

Sheridan-Wyoming Coal Company, *et al.*, protestants; Protests against application for coal lease dismissed.

Motion for the exercise of supervisory power denied.

Motion for the Exercise of Supervisory Power

On July 29, 1947, the Department denied the motion of Sheridan-Wyoming Coal Company and others for a rehearing of a decision of the Bureau of Land Management, approved by the Department on April 10, 1947, which dismissed its protest against the applications of Big Horn Coal Company for coal leases on certain lands in Wyoming.

The facts are set forth at length in the decision approved April 10, 1947. To summarize them, Big Horn Coal Company obtained in December 1943, a coal lease from the State of Wyoming covering certain lands owned by the State. At about the same time the company filed an application for a coal lease of adjacent Federal lands and later filed a second application for additional adjacent Federal lands. Sheridan-Wyoming, joined by numerous others, protested the lease applications on the basis of the following regulation:

"The General Land Office [1] will make favorable recommenda-

[1] Now the Bureau of Land Management.

tion that leasing units be segregated and that auctions be
149 authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." 43 CFR 193.3.

The departmental decision of July 29, 1947, observed that Big Horn Coal Company "has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business." The decision concluded that "the Department will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise."

The motion for the exercise of supervisory power asserts that there exists an exigency demanding the exercise of such authority, and in support thereof recites the importance of a departmental interpretation of the quoted regulation favorable to the position of the protestant. But the same argument was presented to the Department in the motion for rehearing and was fully considered at that time.

Sheridan-Wyoming also contends that Big Horn Coal Company should have been aware at the time when it applied for a State lease that the coal reserves on State lands would be inadequate and that the availability of coal on the adjacent Federal lands would be shortly required if Big Horn Coal Company were to remain in business. But this is hindsight. The period of time which would
150 be required by Big Horn to exhaust coal deposits on the State lands could not have been foretold in December 1943, because at that time the company had no production history and no established outlets for its product upon the basis of which could be estimated the annual tonnage which it could produce and sell.

The protestant also contends that it is losing business to its new competitor and cites the number of shifts it lost during the first 7 months of 1947 because of a lack of market for its coals. Such statistics, while no doubt accurate, are at best inconclusive. The coals produced by Sheridan-Wyoming and by Big Horn are sub-bituminous, high in moisture, and almost wholly lacking in stocking qualities. Because of these factors consumers of this type of coal customarily buy it for immediate consumption and not for storage or reserve purposes. As a result, mines producing this sub-bituminous coal are unable in normal periods to maintain steady production throughout the year, but, on the contrary, they may even be compelled to close their operations during the hot months. Customarily, they produce at substantially less than capacity during the

warm months of the year. No evidence is offered by Sheridan-Wyoming to distinguish between shifts lost as a consequence of its normal production pattern and those which may be lost by reason of the competition as may be offered by Big Horn Coal Company. Sheridan-Wyoming does show that its annual production is declining from the extraordinary peak it attained during the war years. It is noted, however, that from the period 1931 through 1941 the company at no time attained an annual production in excess of 600,000 tons.[2] Nevertheless, its production for the calendar year 1946, of 828,269 tons indicates that it has thus far fairly with
151 stood any competition which it might have been offered by Big Horn Coal Company. And the prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence.

Sheridan-Wyoming states that in reliance upon the freedom from competition offered by the quoted regulations, it has made investments in mining equipment amounting to well over one million dollars. Yet, the affidavit of the president of the company, dated September 24, 1947, discloses:

> "• • • a true history of the indebtedness of the Sheridan-Wyoming Coal Company, Inc.;
>
> "The Sheridan-Wyoming Coal Company, Inc., was organized under the laws of the State of Delaware as of January 1, 1920. At that time there was authorized and issued First Mortgage Bonds in the amount of $3,500,000.00 bearing 7% interest, and Debentures in the amount of $3,500,000.00 bearing 7% interest. As of July 1, 1927 all of the Debentures were paid off with the exception of $1,760,000.00, for which Preferred Capital stock was issued to the holders of the debentures. As of July 1, 1927, the First Mortgage Bonds had been retired down to $1,733,000.00. As of July 1, 1927, a new First Mortgage Bond issue was authorized and issued in the amount of $3,000,000.00 bearing 6% interest. Out of this amount, $1,733,000.00 was used to pay off $1,733,000.00, which was the balance of the old bond issue not yet retired. The balance of the $3,000,000.00 was used in the purchase of new machinery for the further mechanization of the Company's mines. This $3,000,000.00 First Mortgage Bond issue was paid off in monthly instalments during the period July 1, 1927 and July 1, 1945, on which date the last instalment was paid."

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[2] The exact tonnages are tabulated by years on page 73 of the brief of protestants in support of their motion for rehearing.

A further affidavit of the same officer gives:

> 152 "* * * a complete statement as to the advances made to Sheridan-Wyoming Coal Company, Inc. by United States Distributing Corporation and The Pittston Company in all the years from January 1, 1920 down to the present time, namely: 1947;
>
> United States Distributing Corporation

	Amount	Paid
January 1, 1920	$ 56,250.00	August 3, 1920
December 28, 1936	22,200.00	December 31, 1938
The Pittston Company		
October 28, 1930	109,000.00	April 25, 1932
April 25, 1932	55,000.00	July 23, 1932
July 23, 1932	55,000.00	December 31, 1932
October 21, 1932	55,000.00	December 6, 1937
December 29, 1933	21,000.00	October 25, 1935"

It thus appears that substantial portions of the investment in the Sheridan-Wyoming operations were made long prior to 1934, the date of the regulation. Furthermore, even if the regulation were to be interpreted as broadly as Sheridan-Wyoming desires, the company would still face the risk of competition from mines opened and operated exclusively on non-Federal lands.

It is also suggested that the Department's interpretation of the regulation in its decision of July 29, 1947, will encourage evasion of the regulation by those who will seek to extend their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn.[3] The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal
153 reserves. What the decision would be were a case presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding.

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[3] For photographs and a detailed description of Big Horn's mining techniques and equipment, see *Coal Age* (McGraw-Hill) October, 1947. pp. 102-106.

All persons interested in this matter have had abundant opportunity to present their facts and arguments in writing. Sheridan-Wyoming and Big Horn have taken full advantage of this opportunity. In addition, a hearing attended by both companies was conducted by the Under Secretary prior to the original decision in this case. The record appears to be complete. A further hearing would adduce only cumulative matter. Accordingly, the request of Sheridan-Wyoming for a hearing on its motion for the exercise of supervisory power is denied.

The motion for the exercise of supervisory power is denied. *Cobb* v. *Crowther*, 46 L. D. 473 (1918).

(Sgd.) J. A. KRUG,
Secretary of the Interior.

154 EXHIBIT "F"

Regulation 193.3 Federal Code of Regulations, Title 43, is as follows:

"Showing Required that an Additional Coal Mine Is Needed

The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished a *satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.*" . . . (Italics supplied.)

This regulation together with others relating to public mineral land, was published in pamphlet form by the Department of the Interior with a preface from which the following is excerpted:

(These) "regulations were codified and published pursuant to section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U. S. C., Sup. 311)."

• • •

"The Federal Register Act makes the documents which were codified and published pursuant thereto prima-facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication."

155 EXHIBIT "G"

United States Department of the Interior

Office of the Secretary

Washington

A. 24226
Carl T. Olson March 25, 1946.

"N"

: Bismarck 024806
: Application for coal lease
: rejected
: Affirmed.

Appeal from the General Land Office

The Commissioner of the General Land Office rejected the application of Carl T. Olson for a coal lease embracing the NW¼ Sec. 21, T. 154 N., R. 100 W., 5th P. M., North Dakota, on the ground that the issuance of the lease would jeopardize production from mines already opened in the vicinity.

In his appeal from the decision Olson pointed out that, during the winter months many persons in the vicinity are unable to secure a supply of coal. He contends that in periods of severe weather this situation may involve local consumers of coal in a situation of substantial danger. Accompanying his appeal Olson submitted a petition signed by numerous residents in the vicinity of the lands involved which support his position.

Because of the representations made by Olson the Geological Survey conducted another examination into the situation. The report made as a result of this examination shows that any inability of the underground mine operators in the area to meet the demands of the local coal trade was temporary and due principally to labor shortage and to the fact that the coal users deferred the placing of their coal orders until cold weather as had been their practice when labor was plentiful. Moreover, the production from the nine underground mines in the area is supplemented by a large supply of coal available from the strip mine on coal lease, Bismarck 024602, of Edward F. Lovejoy which, by utilizing a skeleton crew, is capable of supplying the local as well as outlying
156 trade in nearby counties.

Olson also requests in his appeal "that this matter be considered as a question of government policy regarding the future development of the lignite coal industry in North Dakota, Montana and elsewhere in the United States" taking into consideration "possibilities in the use of lignite coal for the manufacture of

nylon and many chemicals and other by-products which may revolutionize the future production of many essential articles."[1]

While this Department is not entrusted with the establishment or administration of general governmental policy relating to the lignite coal industry, it is apparent that applicant's request calls for reconsideration of the applicable rule of this Department respecting the lease of coal lands in situations of this type.

Lignite coal, by general accepted definition, differs from standard bituminous coal principally in respect to friability and to moisture, B. T. U. and other factors revealed by proximate analysis. Substantially any use to which lignite coal may be put, however, is also able to be met by bituminous coal; and to the extent that lignite coal enters into markets which may be served by bituminous coals, it is subject to the same economic stresses as apply to bituminous coals. Periods of depression in the bituminous coal industry weigh heavily upon lignite coal producers. Despite minor structural and chemical differences in the composition of the two coals the economies of the two industries are interwoven into a single fabric; each affects directly the course of the other. It is apparent therefore that the same considerations which are applicable to the lease of additional bituminous coal lands are also relevant
157 to the lease of additional lignite coal lands.

The policy of the Department in this regard dates back to 1934:

> "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." (43 Code Federal Regulations 193.3); cf. 54 I.D. 350 (1934).

The reasons prompting the establishment of this policy were founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest. The condition of the coal industry

> ". . . 'for many years (had) been indeed deplorable.' Due largely to the expansion under the stimulus of the Great War, 'the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons' to meet a demand 'of less than 500,000,000 tons.' In connection with this increase in surplus

[1] Applicant does not represent that the coal it proposes to produce would find its way into such byproduct markets.

production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. . . . Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields." Appalachian Coals, Inc. v. United States, 288 U. S. 344, 361 (1933).

". . . Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in
158 extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines. . . . The plight of the industry was not merely a menace to owners and to mine workers; it was and had been long a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy." Cardozo, J., dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 330, 331 (1936).

". . . The investigations . . . are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition 'had been degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395 (1940).

Nor is there a reason to believe that the condition of excess production capacity has disappeared from the bituminous coal industry during the recent period of the war. It is true that there were recurring periods of severe shortages of coal. These shortages, however, appear to have been attributable, chiefly to a deterioration in the supply of available, experienced mine workers. At the

present time there is no firm reason for believing that with the restoration of an adequate labor supply and the elimination
159 of depleted domestic, industrial and railroad reserves of coal, the industry will not again be confronted with a recurrence of the situations above described.

Were the departmental rule to rest alone upon the general public interest it would be a reasonable and appropriate measure. But it finds firmer support. With respect to coal deposits upon the public domain, the Government assumes the capacity of a proprietor who desires the fruitful exploitation of the natural resources upon his lands.

Overproduction in the bituminous coal industry strikes at the prosperity of producers large and small, old and new. Overhead costs are slashed and then, as the effects of overproduction accumulate, impairment settles upon the ability of producers to meet fixed commitments. As a royalty owner the Government suffers. Finally, with both capital and income exhausted, many producers give up the losing battle. In the light of conditions which exist in the industry, no market exists in which these producers can dispose of their mines and recover even a portion of their investments. Again the Government is the loser, for an abandoned mine frequently deteriorates beyond the point where it will be profitable within the foreseeable future to reopen it for the recovery of the merchantable coal left in the ground. Props give way, roofs collapse, water fills the entries and passageways, rails and equipment waste away in rust and corrosion. To the consumers of the Nation good coal once potentially available through operation of the mine is lost and to the Government the royalties it might have brought are gone.

It is true, of course, that the position of the Department as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot through this method alone enable the industry to
160 elude the press of natural economic forces. But this does not mean that the Department should knowingly contribute to an unfortunate situation. On the contrary, the course of wisdom would indicate that it should carefully refrain from accentuating a condition which may bring depression upon a great industry and those who depend upon it for their livelihood. This consideration, taken in conjunction with the position of the Department as a present potential royalty owner, indicates that revision of the departmental rule at this time would be harmful to the lignite coal industry and not in the public interest.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

161 EXHIBIT "H"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary

Washington, December 19, 1946

"N"

: Bismarck 024806
: Motion for rehearing
: Motion denied

MOTION FOR REHEARING

The Department affirmed a decision of the General Land Office[1] which rejected the application of Carl T. Olson for a coal lease embracing the NW ¼ sec. 21, T. 154 N., R. 100 W., 5th P. M., North Dakota. The ground for the decision was a finding that there is already sufficient productive capacity in the vicinity to meet the demands of the market which Olson proposes to serve. In such case, the rule of the Department precludes the granting of an additional coal lease (43 Coal Federal Regulations 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule, the decision concluded that it would be contrary to the public interest to abandon this rule.

Olson has moved for a rehearing. He contends that appearances are misleading as to the productive capacity of the mines in the vicinity, since they all produce a lignite coal which deteriorates readily, weathers poorly and is generally unsuited to stocking and storage. For this reason, he asserts, residents in the vicinity must postpone purchase of their coal supplies until winter; and because

162 the capacity of the local mines is inadequate to meet this seasonal peak demand, nearby farmers suffer during intense winter weather as a result of making fruitless trips to mines which are unable to supply their orders at such critical times.

In view of these contentions, the Department has caused another investigation to be made of the capacity of the coal mines in the vicinity involved here. This investigation shows that the nearby Lovejoy strip mine (Bismarck 124602) has been developed to the point where, with other nearby mines, it will be able to meet the peak needs of persons residing in the vicinity. In addition, since the decision of the Department on appeal, truck and wagonloading facilities at the Lovejoy mine have been expanded to accommodate

[1] Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876, 7776).

the extraordinary demands of customers during harsh weather. It thus appears that there is now sufficient coal-producing capacity in the vicinity to avoid recurrence of the conditions described by Olson.

Olson does not challenge the reasons which support the departmental rule, supra, but he suggests that the reasons are inapplicable to this particular area since it is economically isolated from the remainder of the coal industry and consequently, is not affected by, nor does it affect, the rest of the industry. The causes and consequences of productive over-capacity as described in the departmental opinion are as valid in an isolated area as on a national scale. More, when conditions of overproduction becomes manifest in one area, normal channels of distribution for producers in that area become lost, and the press for outlets extends the deadening effects of the overproduction into other nearby and, in extreme cases, distant areas.

The motion for rehearing is denied.

(Sgd.) G. GIRARD DAVIDSON,
Assistant Secretary of the Interior.

163 EXHIBIT "I"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary

Washington, September 3, 1946.

A. 24405
Lyman Ray Cox

"N"
: Salt Lake City : 269
: Coal-lease application rejected
: Affirmed.

Appeal from the General Land Office[1]

On the ground that there was no satisfactory showing that an additional coal mine is needed in the district in which the land involved is located, the Commissioner of the General Land Office denied the application of Lyman Ray Cox for a coal lease embracing land in T. 14 S., R. 7E., S. L. M., Utah. From this decision the applicant has appealed. He states that the land he seeks has been partially developed as a coal mine by others in the past; that an additional supply of coal is required in the vicinity; and that the

[1] Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

policy of the Department is improper if it rejects applications for coal leases where it is not shown that an additional supply of coal is needed.

The regulation of the Department under which the application was rejected is as follows:

> "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be
> 164 reasonably met." (43 Code Federal Regulations 193.3)

This regulation was promulgated in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that repeal of the regulation would be harmful both to the bituminous coal industry and to the public interest. (Carl T. Olson (A. 24226) March 25, 1946, unreported.) The application advances nothing which would warrant revision of the regulation.

Because of the applicant's representation that an additional supply of coal is needed, a further field examination was made. The report of the examination discloses that lack of demand has caused abandonment of a number of mines in the vicinity. It emphasizes that there is not sufficient market to give reasonable working time to the remaining small mines and that, within a year, large shipping mines in the vicinity will be working part-time. This augurs an economic condition which may well force the abandonment of more small mines with consequent waste of the Nation's natural resources. The Department will not grant applications to open new mines which will depress an already wasteful condition.

The decision of the Commissioner is affirmed.

(Sgd.) G. GIRARD DAVIDSON,
Assistant Secretary.

165 EXHIBIT "J"

Copy

UNITED STATES DEPARTMENT OF THE INTERIOR

General Land Office

District Land Office, Buffalo.
Serial No. 037167.

Mining Lease of Coal Lands under Act of February 25, 1920

This indenture of lease, entered into, in quintuplicate, this 24th day of September A. D. 1943, by and between the United States of America, acting in this behalf by the First Assistant Secretary of

the Interior, party of the first part, hereinafter called the lessor, and Sheridan-Wyoming Coal Company, Inc., of Monarch, Wyoming, party of the second part, hereinafter called the lessee, under, pursuant and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter called the "act."

WITNESSETH:

That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in, upon, or under the following described tracts of land, situated in the State of Wyoming, to wit: SW¼ Sec. 31, W½W½ Sec. 32, T. 57 N., R. 84 W., SE¼, S½SW¼ Sec. 25, all of Sec. 36, T. 57 N., R. 85 W., 6th P. M., containing 1,200 acres, more or less, together with the right to construct all such works, buildings, plants, structures and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and subject to the conditions herein provided, to use so much of the surface as may be reasonably required in the exercise of the rights and privileges herein granted.

166 Section 1. That the lessor expressly reserves:

(1a) The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(1b) The right to lease, sell, or otherwise dispose of the surface of said lands or any part thereof under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the mining and removal of the coal therein, and to lease other mineral deposits in the lands, under the provisions of said act.

(1c) The full power and authority to carry out and enforce all the provisions of Section 30 of said act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly; and to safeguard the public welfare.

Section 2. The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

(2a) To invest in actual mining operations, development, or improvements upon the land leased, or for the benefit thereof, the sum of Sixty Thousand Dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year.

(2b) To furnish a bond in the sum of $10,000 conditioned upon the expenditure of the amount specified in (2a) hereof and
167 upon compliance with all the other terms of the lease. (In case of a $10,000 bond, a bond in the sum of $5,000 may be substituted after the investment requirement has been met.)

(2c) To pay as an annual rental for each acre or part thereof covered by this lease, the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth year, and $1 per acre for the sixth and each succeeding year during the life of this lease, all such annual payments of rental to be made to the register of the United States Land Office of the district in which said land is situated on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

(2d) To pay to such register a royalty of 10 cents a ton (until December 31, 1946, and 8 cents a ton for the balance of the initial term, on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

(2e) To determine accurately the weight of all coal mined from the leased premises, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for such purpose.

(2f) To furnish quarterly, within 30 days after the expiration of the quarter, a written report covering such quarter, certified under oath by the superintendent of the mine, or by such other agent having personal knowledge of the facts as may be designated by the lessee for such purpose, showing the number of tons of 2,000 pounds of coal mined during the quarter, the character and quality thereof, amount of coal and products and by-products thereof disposed of and price received therefor, amount of coal and its products in storage or held for sale, and amount used in operations under this lease.

168 (2g) Also to furnish annually, and at such other times as the Secretary of the Interior may require, in the manner and

form prescribed by the Secretary of the Interior, plat, map, or tracings showing all development work and improvements upon the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon the leased lands, a statement as to the amount and grade of coal produced and sold, and amount received therefor by operations hereunder, and, if a corporation, the amount of capital stock and list of its stockholders.

(2h) To keep at the mine office clear, accurate, and detailed maps, on a scale not more than 200 feet to the inch, in the form of horizontal projections on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Each map of the workings in any coal bed shall show the thickness of the coal and of partings, and the dip and strike of each bed at intervals of 500 feet or less; the location of all openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and all other mine openings, shafts, airways, appliances, and devices, constructed or placed in the mine or any of the workings thereof; and such maps shall also show the elevation relative to sea level or a Government survey corner of the principal points of the various beds and workings.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before the first day of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by lessor.

169 (2i) That, beginning with the fourth year of the lease, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall mine and pay a royalty on not less than 60,000 tons of coal per year, unless on application and showing made, operations shall be suspended for not exceeding six months at any one time, pursuant to section 7 of the act; or unless the lessee shall pay the royalty less rent, on such minimum amount of coal, for one year in advance, in which case operations may be suspended for that year.

(2j) That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises without the written consent of the lessor being first had and obtained.

Section 3. It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period, but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions provided in Section 6 (b) and 6 (c) hereof.

Section 4. This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe, unless the laws of the State where the leased land or deposits are situated otherwise provide, in which case such State laws control:

(4a) The lessee shall carry out and observe regulations prescribed by the Secretary of the Interior and in force at the date hereof relative to (1) reasonable diligence, skill, and care in the operation of said property in accordance with approved methods and practices; (2) the prevention of undue waste; (3) the safety and welfare of miners; and (4) insuring the fair and just weighing or measurement of the coal mined by each miner.

(4b) And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and other employees full and complete freedom of purchase but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators, or fuses; and shall not require or permit miners or other employees, except in case of emergency, to work underground for more than eight hours in any one workday, and shall not employ any boy under the age of 16 years, or any girl or woman without regard to age in any mine below the surface.

Section 5. And the lessee also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations.

(5a) And also shall permit the lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from any or all of same, if desired.

(5b) And also shall permit the lessor or its lessees or transferees, with the approval of the lessor, to make and use upon or under the leased lands any workings necessary for freeing any other mine

from water or gas, or extinguishing fires, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder; provided, that any such use by a transferee or another lessee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

171 (5c) And also shall, at the termination of this lease, as the result of forfeiture thereof, pursuant to paragraph (6d), deliver up to the lessor the lands covered thereby, including all fixtures, machinery, improvements, and appurtenances other than strictly personal property, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises.

Section 6. It is further mutually understood and agreed as follows:

(6a) That the lessor may, in writing, waive any breach of the covenants and conditions contained herein, except such as are required by the act, but any such waiver shall extend only to the particular breach so waived, and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

(6b) The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease upon payment of all rents, royalties, and other debts due and payable to the lessor and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; and the lessee may with like consent surrender any legal subdivision of the area included within the lease; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered hereby.

(6c) That on the termination of this lease, pursuant to the last preceding paragraph, the lessor, his agent, licensee, or
172 lessee shall have the exclusive right at the lessor's election to purchase at any time within six months thereafter, at the appraised value, any or all buildings, machinery, tools, or other property placed by the lessee in or on the lands leased hereunder, save and except all underground timber and such other supports and structures as are necessary for the protection and preservation of the mine, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to

be paid for said buildings, machinery, equipment, tools, or other property to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party hereto and the third to be selected by the two so designated), the valuation so determined by the three or a majority of them to be conclusive and binding upon both parties; that pending such election to purchase within the said period of six months none of the buildings or other property shall be removed from their normal position; that if such valuation be not requested or the lessor shall affirmatively, in writing, elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings, machinery, equipment, tools, and other property within 90 days after being notified in writing by the lessor that the said lessor does not elect to purchase any or all of the buildings, machinery, equipment, tools, or other property, and in case of failure to so remove the said property within 90 days after receipt of such notice, then said buildings, machinery, tools, or other property shall become the property of the United States.

(6d) If the lessee shall fail to comply with the provisions of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the
173 general regulations promulgated and in force at date hereof, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in Section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might otherwise have.

Section 7. It is further covenanted and agreed that, should the lessee fail to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of lessee.

Section 8. It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Section 9. It is also further agreed that no member of or delegate to Congress or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and

the provisions of Section 3741 of the Revised Statutes of the United States and Sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909
174 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In Witness Whereof

THE UNITED STATES OF AMERICA,
(s.) By OSCAR L. CHAPMAN,
Assistant Secretary of the Interior, Lessor,
SHERIDAN-WYOMING COAL CO., INC.,
(s.) By D. H. PAPE,
Its President, Lessee.

Witnesses:
R. E. MCNALLY,
T. A. WANERUS.

175 EXHIBIT "K"

Filed May 25, 1948. Harry M. Hull, Clerk.

176 THE UNITED STATES OF AMERICA, ss:
The President of the United States of America.

To the Honorable the Justices of the District Court of the United States for the District of Columbia,

GREETING:

Whereas, lately in the District Court of the United States for the District of Columbia, before you or some of you, in a cause between Sheridan-Wyoming Coal Company, Inc., plaintiff, and Julius A. Krug, defendant, Civil No. 4465-47, wherein the judgment of the said District Court entered in said cause on the 17th day of November, 1947, is in the following words, viz:

"This cause came on to be heard on the defendant's motion to dismiss the complaint; and after consideration thereof it is by the Court, this 17th day of November, 1947,

"ADJUDGED, ORDERED and DECREED that the defendant's motion be, and it hereby is, granted and that the complaint be, and it hereby is, dismissed on the ground that it fails to state a claim upon which relief can be granted.

"ALEXANDER HOLTZOFF,
"Justice."

177 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

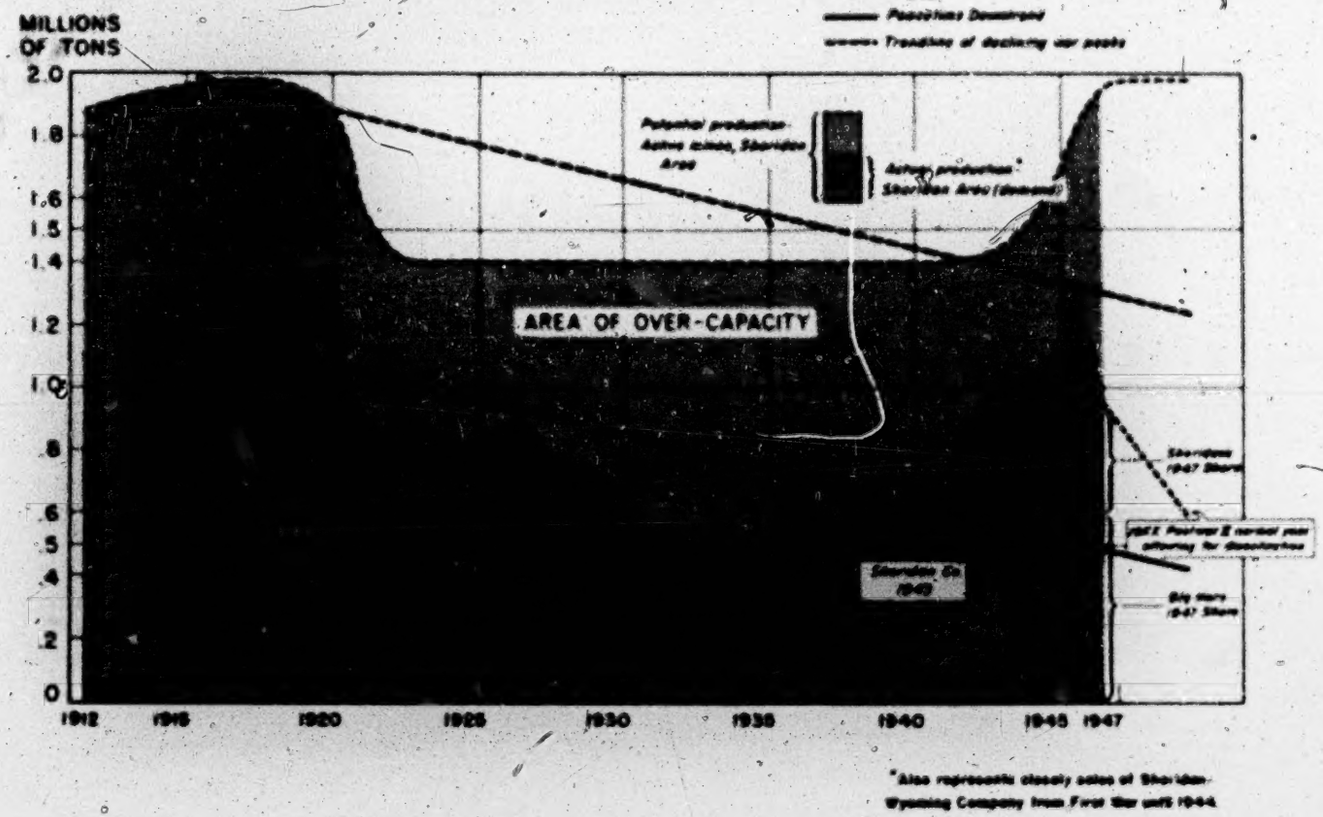
LIBRARY
SUPREME COURT, U.S.

Addition to record in case No. 60 at page 84.

EXHIBIT "K"

INTERRELATION BETWEEN PRODUCTION AND DEMAND FOR SHERIDAN AREA COAL

1912 to 1946 through Normal and Two War-Boom Periods showing resultant Downward Trend.



*Also representing closely sales of Sheridan-Wyoming Company from First War until 1944.

178 And Whereas, in the term of January, in the year of our Lord one thousand nine hundred and forty-eight, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this Court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court. Schaff v. R. W. Claxton, Inc., 79 U. S. App. D. C. 207, 144 F. 2d 532 (1944).

March 29, 1948.

179 You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause not inconsistent with the order of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the 24th day of May, in the year of our Lord one thousand nine hundred and forty-eight.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

180 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ON MANDATE—Filed June 9, 1948.

Plaintiff having appealed to the United States Court of Appeals for the District of Columbia from the judgment dismissing the complaint entered in this cause on November 17, 1947, and said Court having issued its mandate dated the 24th day of May, 1948, wherein it was ordered, adjudged and decreed that such judgment be affirmed, with leave to this Court to entertain a motion by plaintiff to amend its complaint, and with leave to this Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided

that such motion be made within ten days after the mandate is filed in this Court, and such mandate having been received and filed by the clerk of this Court on the 25th day of May, 1948.

Now upon the mandate of the United States Court of Appeals for the District of Columbia, dated the 24th day of May, 1948, it is this 8th day of June, 1948,

ORDERED, ADJUDGED AND DECREED that the judgment entered in this cause on the 17th day of November, 1947, be and it is in all respects, affirmed, and this Court resumes jurisdiction of the cause, to dispose of any timely motion by plaintiff for leave to
181 amend its complaint, in such manner as seems proper to this Court in its discretion, in accordance with the mandate.

ALEXANDER HOLTZOFF,
Justice.

Approved as to form:

——— ———, ——— ———, Attorneys for plaintiff.
RALPH S. BOYD, Attorney for defendant.

182 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., PLAINTIFF,

v.

JULIUS A. KRUG, Secretary of the Interior, DEFENDANT

MEMORANDUM—Filed July 6, 1948

The original complaint in this case was dismissed by this Court on defendant's motion. The United States Court of Appeals for the District of Columbia affirmed that decision but granted leave to this Court to entertain a motion by plaintiff for leave to amend its complaint. Plaintiff undertook to amend its complaint as of right by serving a copy of its proposed amendment on defendant's counsel and giving the original to the Clerk of this Court for filing. Thereafter, plaintiff filed a motion for leave to file the amended complaint and the case came on to be heard on that motion. The Court has carefully considered that motion. The Court has also considered, in the light of the opinion of the Court of Appeals in this case, the proposed amendments which were not contained in the original complaint. It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence granting

leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation. Accordingly, the motion for leave to amend the complaint is overruled.

F. DICKINSON LETTS,
Justice.

July 6th, 1948.

183 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

ORDER OVERRULING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CONTINUING TEMPORARY INJUNCTION—Filed July 6, 1948

This cause came on to be heard on plaintiff's motion for leave to file an amended complaint and on plaintiff's motion for a preliminary injunction pending final hearing, and the Court having taken the motions under advisement, by consent of counsel a temporary injunction pending consideration of the motions under advisement was entered on June 4, 1948. The Court having considered plaintiff's motions, it is by the Court this 6th day of July, 1948,

ORDERED, that plaintiff's motion for leave to file an amended complaint be overruled and that plaintiff's motion for a preliminary injunction be denied, and

IT IS FURTHER ORDERED, that the temporary injunction entered herein on June 4, 1948, be and it is hereby extended and continued for ten days from this date in order to permit plaintiff to apply to the United States Court of Appeals for the District of Columbia for review of this order.

/s/ F. DICKINSON LETTS,
Justice.

No objection as to form:

STEPHEN J. MCMAHON, JR., T. PETER ANSBERRY, Attorneys for Plaintiff.

184 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

NOTICE OF APPEAL—Filed July 7, 1948

Notice is hereby given that the Sheridan-Wyoming Coal Company, Inc., plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia, from that part of the order entered herein denying plaintiff's motion for leave to amend its complaint entered herein on July 6, 1948.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

July 7, 1948.

CC: RALPH S. BOYD,
Department of Justice.

185 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

NOTICE OF INTENTION TO APPLY ALLOWANCE OF SPECIAL APPEAL —Filed July 7, 1948

Notice is hereby given this seventh day of July, 1948, that the Sheridan-Wyoming Coal Company, Inc., plaintiff herein, hereby intends to apply for allowance of a special appeal to the United States Court of Appeals for the District of Columbia from that part of the order of this Court entered on the sixth day of July, 1948, in favor of Julius A. Krug, defendant herein, which denies plaintiff's motion for leave to amend its complaint, against said plaintiff, the Sheridan-Wyoming Coal Company, Inc.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

July 7, 1948.
CC: RALPH S. BOYD,
Department of Justice.

186 Service of a copy of the foregoing is hereby acknowledged this 12th day of July 1948.

ROGER P. MARQUIS,
Attorney for Appellee.

187 Clerk's Certificate to foregoing transcript omitted in printing.

188 IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Docket No. 9946

[File endorsement omitted]

SHERIDAN-WYOMING COAL COMPANY, INC., Monarch, Wyoming, APPELLANT

v.

JULIUS A. KRUG, Washington, D. C., APPELLEE

MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL OR IN THE ALTERNATIVE MOTION FOR CONTINUANCE OF TEMPORARY RESTRAINT PENDING CONSIDERATION OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 13, 1948

Comes now the appellant and moves that this Honorable Court grant a temporary injunction pending appeal for the following reasons:

On the sixth day of July, 1948, the District Court of the United States, by Mr. Justice Letts, entered an order overruling appellant's motion for leave to file an amended complaint and continuing the temporary restraint which the District Court had previously granted until ten days from the entry of such order, in order to allow appellant an opportunity to appeal to this court. *This temporary restraint will expire on the sixteenth day of July, 1948.*

I

Temporary restraint in this cause was originally granted by the District Court by its Chief Justice on November 4, 1947, when appellant filed its original complaint for an injunction.

The District Court, by Mr. Justice Holtzoff, thereafter dismissed the complaint but continued temporary restraint for seven days to allow appellant to apply to this court for further temporary restraint pending appeal.

189 This Court then continued the District Court's temporary restraint pending consideration of appellant's motion for temporary injunction pending appeal. Later, this court, after an

extensive hearing, granted the motion for temporary injunction pending appeal.

After affirmance by this Court, and modification of its judgment to allow appellant opportunity to amend, the mandate of this Court was stayed *for thirty days upon the motion of the appellee*, while appellee considered applying for certiorari.

The stay was further extended, upon the motion of the appellant, for a period of ten days after the mandate was received by the District Court. Then, the District Court, by Mr. Justice Letts, temporarily issued its restraint pending disposition of a motion for leave to amend the complaint. Upon the denial thereof, that Court again extended its temporary restraint for an additional ten days as indicated *supra*.

II

The District Court, by Mr. Justice Letts, denied appellant's motion for leave to amend its complaint upon the sole ground, stated in its memorandum opinion, dated July 6, 1948, that:

> "The proposed new matter adds nothing material to the claim and issue presented by the plaintiff in its original complaint, and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation."

It is submitted this ruling was clearly erroneous. Appellant was thus denied an opportunity even to plead a certain Federal coal lease which it holds and other facts pertinent thereto which this Court had previously indicated were requisite to appellant's standing to sue. This Court in its opinion stated:

190 *"Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands;* that the regulation above mentioned, having the force of a statute, was part of its lease; and that this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the Chicago Junction Case and kindred cases and under the general considerations which controlled the Court in deciding Federal Communications Commission v. National Broadcasting Co. and similar cases. *Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute, or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses.* Under the decisions, those persons were entitled to sue. *The difficulty*

with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease." (emphasis supplied)

Under the District Court's order the appellant would be prevented from reaching the merits of this cause as outlined in the opinion of this Court by a "procedural" ruling, erroneous both in substance and as a technical matter.

III

The appellee can show no pressing urgency for discontinuance of temporary restraint. It did make such attempt before this Court on Appellant's previous motion for temporary injunction pending appeal. At that time, appellee introduced an affidavit claiming great hardship and difficulty in having to await orderly legal disposal of this case. That affidavit, which this Court passed upon, was patently erroneous as shown by appellant's opposing affidavit.

Appellee has not again attempted to claim pressing urgency. *Appellee's thirty day stay while considering certiorari from a favorable decision of this Court indicates the absence of urgency.*

191 In actual fact, Big Horn is not urgently in need of the coal due both to the summer season and the realization of the collapse of the Sheridan market predicted in appellant's graph of last November.

IV

The expiration of temporary restraint would enable the appellee to issue the leases in question. The Big Horn Coal Company, a non-resident of the District of Columbia, upon whom service cannot be obtained, then becomes a necessary party under the doctrine of *Brady* v. *Work*, 263 U. S. 435. Therefore, this Court would lose jurisdiction before a decision on the merits. Appellant thus loses all remedy the instant restraint lapses. Appellant would suffer irreparable harm by the probable destruction of its entire business. Moreover, the novel and important questions of substantive law raised by the amended complaint would remain unsettled.

CONCLUSION

Wherefore, appellant respectfully prays that its motion for temporary injunction pending appeal be granted or in the alternative that the temporary restraint of the District Court which will expire on the 16th day of July, 1948, be continued temporarily

pending further consideration and a hearing by this Court of the motion for temporary injunction pending appeal.

Respectfully submitted,

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Appellant.

Dated: July 10, 1948.

Service of a copy of the foregoing is hereby acknowledged this 10th day of July 1948.

(S.) ROGER P. MARQUIS,
Atty. for Appellee.

192 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9946

[File endorsement omitted]

[Title omitted]

Before STEPHENS, C. J., and PRETTYMAN, J.

ORDER CONTINUING TEMPORARY INJUNCTION, ETC.—Filed July 16, 1948

On consideration of appellant's motion for a temporary injunction pending appeal herein, and of appellee's objections thereto, and of appellant's reply, it is

ORDERED by the Court that the temporary injunction entered in this cause in the District Court on June 4, 1948, be, and it is hereby, continued in effect pending the final disposition of this appeal by this court, or pending the further order of this court in this case.

It is FURTHER ORDERED by the court that this appeal be advanced and set down for hearing in October, or as soon thereafter as the docket of the court will permit.

Dated July 16, 1948.

Per Curiam.

193 UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9946

[Title omitted]

[File endorsement omitted]

MOTION TO DISMISS APPEAL—Filed July 16, 1948

Julius A. Krug, appellee above-named, moves this Court to dismiss the appeal sought to be taken on July 7, 1948. This motion is made for the following reasons:

Appellant above-named has moved this Court for a temporary injunction pending appeal and has filed a petition for special appeal. The facts of the case and the authorities which show that appellant had no right to appeal from the order of July 6, 1948, are stated in appellee's memorandum in opposition to the motion for temporary injunction pending appeal and to the petition for special appeal. For the reasons there stated, it is submitted that the attempted appeal as of right should be dismissed.

Respectfully,

ROGER P. MARQUIS,
Attorney, Department of Justice,
Attorney for Appellee.

July 1948.

Service of a copy of the foregoing is hereby acknowledged this 16th day of July, 1948, at 11:50.

(Sgn.) STEPHEN MCMAHON,
Attorney for Appellant.

194 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 9932; 9946, April Term, 1948

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, APPELLEE

ORDER

On consideration of the joint motion of the parties herein to allow the record in this case on previous appeal No. 9704 to be made a

part of the record of the present appeal No. 9946 and application for special appeal No. 9932, It is

ORDERED by the Court that the motion be, and it is hereby, granted.

PER CURIAM.

Dated September 3, 1948.

United States Court of Appeals for the District of Columbia. Filed Sep. 3, 1948. Joseph W. Stewart, Clerk.

195 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946, April Term, 1948

[Title omitted]

[File endorsement omitted]

Before: EDGERTON, CLARK and WILBUR K. MILLER, *JJ.*

ORDER DENYING MOTION TO DISMISS APPEAL—Filed Sept. 17, 1948

On consideration of appellee's motion to dismiss the appeal herein, of the objections to the motion, and of the reply to objections, It is

ORDERED by the Court that the motion be, and it is hereby, denied.

PER CURIAM.

Dated September 17, 1948.

196 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9932, April Term, 1948

[Title omitted]

[File endorsement omitted]

Before: EDGERTON, CLARK and WILBUR K. MILLER, *JJ.*

ORDER DENYING SPECIAL APPEAL, ETC.—Filed Sept. 17, 1948

On consideration of the petition for allowance of a special appeal from the order of Mr. Justice F. Dickinson Letts entered in this cause on July 6, 1948, in the District Court of the United States for the District of Columbia, and of the record filed in appeal No. 9704, between the same parties, and of respondent's objections to the petition for allowance of special appeal, It is

ORDERED by the Court that a special appeal from said order be, and it is hereby, denied.

PER CURIAM.

Dated September 17, 1948.

197 IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946

[Title omitted]

[File endorsement omitted]

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE—Filed Oct. 30, 1948

Comes now the Big Horn Coal Company, a Wyoming corporation, and moves this Court for leave to file its brief in this appeal as *amicus curiae*. As grounds for this motion the Big Horn Coal Company shows to the Court as follows:

The appellant, Sheridan-Wyoming Coal Company, seeks by this litigation to cause the appellee, Secretary of the Interior Krug, to be enjoined from executing a lease to Big Horn Coal Company of certain Federal coal lands in Wyoming. The Big Horn Coal Company is in urgent need of the additional coal lands in question and its business operations are being curtailed and seriously jeopardized by the actions of the appellant, which actions have already had the effect of causing the execution of the lease to be delayed for approximately 2¾ years beyond the time when said lease would, but for such actions, have normally been executed.

It is the purpose and desire of the Big Horn Coal Company, in its brief *amicus curiae*, to consider and discuss certain factors that may be regarded by the Court as important to a proper understanding and determination of the appeal, and which are not believed to be fully discussed and considered in the brief of the appellee.

Copies of the brief as *amicus curiae*, which Big Horn Coal Company asks this Court for leave to file, are submitted herewith.

WARD E. LATTIN,
1126 Woodward Building,
Washington, D. C.
Attorney for Big Horn Coal Company, as Amicus Curiae.

W. C. FRASER,
637 Omaha National Bank Bldg.,
Omaha, Nebraska,
Of Counsel.

198 SERVICE OF MOTION OF BIG HORN COAL COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Copies of the motion of Big Horn Coal Company for leave to file brief amicus curiae in case No. 9946, together with copies of the

brief sought to be filed, were mailed to T. Peter Ansberry, 815 15th Street, N. W., Washington, D. C., Stephen J. McMahon, Jr., 1025 Connecticut Avenue, N. W., Washington, D. C. (Attorneys for Appellant), and to A. Devitt Vanech, Assistant Attorney General, Department of Justice, Washington, D. C. (Attorney for Appellee), this 29th day of October, 1948.

WARD E. LATTIN,
1126 Woodward Building,
Washington, D. C.
Attorney for Big Horn Coal Company, as Amicus Curiae

199 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946, October Term, 1948

[Title omitted]

[File endorsement omitted]

ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE—Filed Nov. 20, 1948

On consideration of motion of Big Horn Coal Company, a Wyoming corporation, for leave to file a brief as *amicus curiae* in the above-entitled cause, to which appellant consents, It is

ORDERED by the Court that the motion be, and it is hereby, granted.

PER CURIAM.

Dated November 20, 1948.

200 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted]

No. 9946

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, Department of Interior, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)

Argued December 9, 1948. Decided January 31, 1949

MR. T. PETER ANSBERRY and MR. STEPHEN J. MCMAHON, JR., for *appellant*.

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom Mr. A. Devitt VanEch, Assistant Attorney General, and Mr. John C. Harrington, Attorney, Department of Justice, were on the brief, for *appellee*.

Mr. Ward E. Lattin filed a brief on behalf of Big Horn Coal Company as *amicus curiae*, urging affirmance.

Before: Edgerton, Clark and Prettyman, *JJ*.

Opinion—Filed Jan. 31, 1949

Prettyman, *J.*:

The Sheridan-Wyoming Coal Company, Inc., brought a civil action in the District Court of the United States for the District of Columbia to restrain the Secretary of the Interior from delivering to the Big Horn Coal Company certain leases for federal coal lands. The Secretary moved to dismiss. The court granted that motion upon the grounds that plaintiff had no standing to sue and that the power of the Secretary to grant coal leases is discretionary, not subject to judicial review, and not diminished or restricted by his regulations, specifically Section 193.3 of Title 43, Code of Federal Regulations. Sheridan-Wyoming appealed.

Upon the appeal, this court agreed with the District Court that merely as a member of the coal industry threatened with a new competitor, Sheridan-Wyoming had no standing to sue, citing *Alabama Power Co.* v. *Ickes*[1] and similar cases. But Sheridan-Wyoming argued that it was a lessee of federal coal lands, that the regulation mentioned (43 Code Fed. Regs. § 193.3) was part of its lease,
201 and that it thus had a property right threatened with invasion by the proposed leases to Big Horn, relying upon *Baltimore & Ohio R. R.* v. *United States*[2] and similar cases. As to that contention, this court said:[3]

> "The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease."

This Court, therefore, refused to consider the contention and affirmed the judgment of the District Court but in the mandate gave that court authority to entertain a motion to amend the complaint. Such a motion was presented, offering an amended complaint which contained an allegation that Sheridan-Wyoming was a lessee of fed-

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[1] 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).

[2] 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[3] Sheridan-Wyoming Coal Co. v. Krug, 83 U. S. App. D. C. —, 168 F. 2d 557, 558 (1948).

eral coal lands, attaching a copy of the lease, and otherwise alleging the facts concerning the lease theretofore presented in the course of the argument in this court. The District Court denied the motion to amend, saying:

> "It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation."

It seems to us perfectly clear that the proposed amendment did add something new and material to the claims and issue presented by the plaintiff. The status of one suing merely as a member of an industry to enjoin threatened competition, and the status of one claiming a property right by contract, threatened with invasion, are wholly different.[1] The original complaint in the present case rested on the former status. The amended complaint rested also upon the latter. Moreover, we think this court made clear in its opinion upon the first appeal that plaintiff's rights as a member of the coal industry and its rights as owner of a property right by contract were different. We held that as the former it had no standing to sue. But we pointed out that under the *Baltimore & Ohio* and kindred cases persons claiming protection against threatened invasion of property rights, created by contract upon valid regulations, were entitled to sue.

It is true that the language in the mandate from this court upon the first appeal was, in part: "with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper". It is elementary that a trial court has wide discretion in respect to amendments which are not of right. But that discretion may be controlled by the opinion of this court, and the discretion mentioned in the mandate was likewise circumscribed by that opinion. Moreover, such discretion as the trial court had, or was given, could not deprive this court of its appellate jurisdiction over decisions of that court upon questions of law. The Supreme
202 Court, in *United States* v. *Lehigh Valley R. R.*,[2] had for consideration a refusal of a trial court to permit an amendment in a matter governed by the opinion of the Supreme Court in a prior appeal. The Court held the refusal to be "an absolute abuse of discretion" and expressed the extent of its meaning by adding

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[1] *Compare* Alabama Power Co. v. Ickes, *supra*, with Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929).

[2] 220 U. S. 257, 271, 55 L. Ed. 458, 463, 31 S. Ct. 387 (1911).

"even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate."

We now adhere to our original view that plaintiff's status as a lessee of federal coal lands under a lease which incorporated a valid regulation governing such leases, would be materially different from its status as a mere member of the coal industry. Since the District Court denied the motion to amend upon a contrary view of that proposition, and upon that contrary view alone, its judgment must be reversed.

Both appellant and appellee have now twice argued fully before this court the nature of Sheridan-Wyoming's status as lessee under its lease and the regulation which is involved. This litigation has already consumed a long time. Therefore, in remanding the case for further proceedings, we deem it to be in the interest of justice that we now express our view upon that question for the guidance of the District Court in those further proceedings.

We must first have a careful understanding of what is shown by the record to have occurred. Those events relate to Sheridan-Wyoming's lease, the Departmental regulation, Big Horn's application for a lease, and the Secretary's proposed disposition of that application.

Sheridan-Wyoming's Lease. The coal lands involved are in and around Monarch, Wyoming. The coal is a low-grade sub-bituminous, known as Sheridan area coal. It is high in moisture and almost wholly lacking in stocking qualities. Consumers buy it for immediate use, and mines producing it are unable to maintain steady production throughout the year.

Sheridan-Wyoming was organized in 1920. Substantial portions of the investment in its operations were made long prior to 1934, when the regulation hereinafter discussed was promulgated. It had been a lessee of federal coal lands for many years. Its present lease was executed in September, 1943.

The Regulation of the Department. In 1933 or thereabouts the Department became concerned over the plight of the coal industry upon its lands "and the dread effect of that menacing history upon the public interest." The leasing act[6] gave the Secretary discretionary power to issue coal leases and to withdraw coal lands from lease.[7] In 1934 he wrote letters to the Director of the Bureau of Geological Survey and to the Commissioner of the General Land Office containing identical language as follows:

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[6] Act of Feb. 25, 1920, 41 Stat. 437.

[7] United States v. Wilbur, 283 U. S. 414, 75 L. Ed. 1148, 51 S. Ct. 502 (1931).

"In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

"Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order
203 should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained."

Thereupon the Secretary promulgated the following regulation:

"The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

This regulation was duly published in the Federal Register as part of the Code of Federal Regulations.[8]

Subsequently the regulation was construed by the Department thus: "In such case [i.e., where there is already sufficient productive capacity in the vicinity to meet the demands of the market], the rule of the Department precludes the granting of an additional coal lease (43 Code Federal Regulations 193.3)."[9] In the proffered amended complaint, it is alleged that that ruling represents the heretofore uniform rule of the Department for fourteen years.

Big Horn's Application. The Big Horn Coal Company was incorporated on December 20, 1943. Prior to that incorporation, the persons interested had, on December 2, 1943, procured from the State of Wyoming a lease on certain coal lands belonging to that State, which had theretofore been leased to one Turner, who was unable to meet his commitment. On December 18, 1943, still prior to formal incorporation, the Big Horn people applied for a lease of federal lands adjoining those under lease to Sheridan-Wyoming. The complaint alleges that this application was on the ground that federal land was necessary to the commencement of the new mine.[10]

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[8] 43 Code Fed. Regs. § 193.3 (1938).

[9] *Carl T. Olson*, A. 24226 (Dec. 19, 1946). A similar ruling was made in *Lyman Ray Cox*, A. 24405 (Sept. 3, 1946).

[10] Allegations in the complaint must be treated as true for purposes of the motion to dismiss.

Big Horn did not allege or attempt to show that there was or is a market need for additional coal, which showing is the one requisite for a new lease prescribed by the regulation. Big Horn proceeded to mine its State of Wyoming properties and thereby developed a large business.

The Secretary's Proposed Disposition of Big Horn's Application. The Secretary took no action on Big Horn's application for a federal lease until two years later, when he offered that lease at public auction. Big Horn was the only bidder, and its tender of the first year's rental was accepted. But a number of protests were filed, and no further action was taken for more than a year. Then the protests were dismissed and Big Horn was awarded the right to the lease. In denying the protests, the officials of the Department said, in part:

> "This office will not countenance any deliberate attempts to circumvent the above quoted regulation. The opening of a mine on non-public lands only after an application has been filed for a lease on adjacent public land, will not, where such
> 204 action is taken to effect the circumvention noted, be recognized as vesting any rights on which the granting of the lease may be based. However, the existence of such bad faith will not be presumed in the absence of clear proof thereof. In this instance, the Big Horn Company has alleged its complete bona fides and it is not believed that the evidence submitted by the protestants is sufficient to establish the contrary.
>
> "As to the question of need for an additional mine, it has long been established that Section 193.3 does not apply in cases where Federal lessees seek additional lands as a reserve against imminent exhaustion of workable deposits in an existing mine. (Sec. 43, C. F. R. 193.15). The principle is the same whether that mine is on Federal, state or privately owned lands. The regulation was not intended to be and will not be invoked to drive a going concern out of business.
>
> "In the instant case, the usual criteria for determining the need for a new mine under section 193.3 do not apply because, at the time the Big Horn applications were acted on by the Department and the lease offered at public auction, that company was an active existing mine with a large annual production, and because of the further circumstances that (1) the Big Horn Company has been in operation for about three years and the evidence fails to disclose that its operation has jeopardized the continuance of the competing Sheridan-Wyoming mine (2) both companies apparently serve customers over a very large area embracing several states in which there are numerous other active mines, (3) both companies produce a type of coal which is not readily storable and which has limited uses."

The protestants, including Sheridan-Wyoming, moved for rehearing. The motion was denied. The Department said, in part:

> "In these circumstances, it cannot be said that the Big Horn Coal Company did not open a new mine on the state land. Thus, if consideration of this matter were to be limited to the events of December 1943, it would follow that the requested lease would not issue.
>
> "Thus to limit consideration of this case, however, would be to ignore events subsequent to December 1943. The facts are that since December 1943, without encroaching on federal lands, the Big Horn Coal Company has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business. It would accommodate the expansion of an existing mine which is running out of coal reserves."

Referring to the ruling on the regulation in the *Olson case*,[11] the Department said:

> "In the Olson case, as in cases which have followed it, there was no question concerning the expansion of an existing, operating, going mine. In none of those cases had there been any substantial investment made in connection with operations on non-
> federal lands. None of them involved a situation where
> 205 under leases issued by a State government, a mine operator had obtained markets, acquired customers, and established valuable good will, where machinery and equipment had been acquired and were being used currently in the business of mining a large tonnage of bituminous coal."

Sheridan-Wyoming and the protestants then moved for the exercise of the supervisory power of the Secretary. The motion was denied in a memorandum by the Secretary, in which he said, in part:

> "It is also suggested that the Department's interpretation of the regulation in its decision of July 29, 1947, will encourage evasion of the regulation by those who will seek to expand their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn. The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal reserves. What the decision would be were a case

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[11] *Supra* note 9.

presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding."

It is not claimed by the Secretary that a market need for additional coal has been shown or suggested.

The foregoing are, in brief, the facts upon which Sheridan-Wyoming's status to sue, as established by the complaint, the amended complaint, and the exhibits thereto, must be determined. Preliminary to the affirmative considerations which lead to a conclusion, we note that the ground upon which the Secretary proposes to issue the Big Horn lease in spite of his regulation, is singularly unimpressive. The reason he assigns is that Big Horn has a large, established business and so, although the lease would not have been granted as of the date of the application, it must now be granted. The fact is that Big Horn made its application even before it was incorporated, and all its big business has been built up with full knowledge that it had no federal lease. It has now, according to the Secretary's view, hoisted itself by its own bootstraps.

The Secretary does not claim that the regulation is invalid, and he does not propose to withdraw it or modify it. He does not claim that its sole recited condition for a new lease has been met. He does not deny the construction which he has hitherto given it. He proposes to write an exception into it. He says that it was not intended to apply to the granting of a new lease to an existing company with a large business which alleges that it needs this coal to perpetuate that business. No such exception can be gleaned from the terms of the regulation or from fourteen years of administrative construction.

Sheridan-Wyoming, on the other hand, also has an investment and a good business, which it has established in reliance upon and not in the teeth of the Departmental regulation. The proposed exception would strip from that lease one of its most valuable conditions, a condition established by the Secretary for the declared purpose of protecting then-existing lessees against ruin.

206 The "good faith" of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed venture. It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.

The propositions which lead to a conclusion may be succinctly stated. They are:

1. The regulation of the Secretary (43 Code Fed. Regs. § 193.31) was valid. He had power to withdraw lands from leasing and so could impose the conditions upon which he would lease.[12]

2. The regulation was published in the Federal Register as one of general applicability and legal effect.[13] It had the force and effect of statute. As such, it was binding upon the Secretary until repealed or modified by him.

Judge Sanborn's opinion in *Germania Iron Co.* v. *James*[14] and Commissioner (now Circuit Judge) Frank's opinion in *Consumers Power Company et al.*[15] should be read in full upon this point. Other authorities are cited below.[16]

3. The regulation meant what the Secretary held it to mean. When he promulgated it, he said it reached "substantially the same effect" as a withdrawing of the land from leasing. Thereafter he consistently held that it precluded the grant of leases to these lands unless market need for additional coal was shown.[17]

4. The lease was expressly made subject to the Mineral Leasing Act. Its introductory clause recited that it was "under, pursuant and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat. 437), entitled . . ." The terms of a statute according rights and immunities to a vendee of government property are part of the obligation of the deed made pursuant to it.[18] A lease is no less a contract than is a deed. Thus

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[12] 41 STAT. 438 (1920), 30 U. S. C. A. § 201; 41 STAT. 450 (1920), 30 U. S. C. A. § 189; United States v. Wilbur, *supra* note 7; United States v. Midwest Oil Co., 236 U. S. 459, 475, 59 L. Ed. 673, 682, 35 S. Ct. 309 (1915); United States v. Morrison, 240 U. S. 192, 60 L. Ed. 599, 36 S. Ct. 326 (1916); Stockley v. United States, 271 Fed. 632 (C. C. A. 5th 1921).

[13] 49 STAT. 501 (1935), 44 U. S. C. A. § 305; 49 STAT. 503 (1935), as amended 44 U. S. C. A. § 311.

[14] 89 Fed. 811 (C. C. A. 8th 1898).

[15] 6 S. E. C. 444 (1939), PIKE AND FISHER, ADMIN. LAW DEC. 33f.11-1.

[16] United States v. Perkins, 79 F. 2d 533 (C. C. A. 2d 1935); United States v. Dunton, 288 Fed. 959 (S. D. N. Y. 1923); Sibray v. United States, 282 Fed. 795 (C. C. A. 3d 1922).

[17] *Supra* note 9.

[18] Wood v. Lovett, 313 U. S. 362, 370, 85 L. Ed. 1404, 61 S. Ct. 983 (1941), and cases there cited.

while the regulation was not by specific terms incorporated in the lease, as a valid existing provision of law it was one of the conditions of the lease. It determined that contract to be one of a limited number of leases, a far different contract from a mere lease in an unrestricted potential number. The value of this condition is apparent. The regulation was promulgated to create that value, in the public interest, in the sense that it was designed to prevent the disaster of unrestricted leasing. The background and reason
207 for the regulation were recited in the Secretary's memorandum in the *Olson* case, included in this record. He quoted descriptions of the coal industry from the opinions in *Appalachian Coals, Inc.* v. *United States*[19] and *Sunshine Coal Co.* v. *Adkins*,[20] and from Mr. Justice Cardozo's dissent in *Carter* v. *Carter Coal Co.*[21] To Sheridan-Wyoming the restriction meant that its commitments to mine the coal and to pay the royalties, and to make the prerequisite investments and expenditures, were protected against destruction of the market by the "anarchy" which had theretofore existed, and were supported by governmental adjustment of production to market needs.

5. Sheridan-Wyoming, as possessor of a valuable right, created by contract in the presence of valid and binding restrictive regulations, has standing to sue to protect that right.[22] The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions.[23]

The Secretary has wide discretion in the granting of federal mineral leases, but he has no discretion to violate or ignore an existing general departmental regulation which established one of the conditions upon which he entered into a contract of lease.

The judgment of the District Court is, therefore, reversed and the case remanded with instructions to that court to permit the filing of the proffered amended complaint and to deny defendant's motion to dismiss in so far as that motion rests upon the ground that plaintiff

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[19] 288 U. S. 344, 361, 77 L. Ed. 825, 53 S. Ct. 471 (1933).

[20] 310 U. S. 381, 395, 84 L. Ed. 1263, 60 S. Ct. 907 (1940).

[21] 298 U. S. 238, 330-331, 80 L. Ed. 1160, 56 S. Ct. 855 (1936).

[22] *Frost* v. *Corporation Commission*, *supra* note 4; and cases there cited. The proposition is much discussed in the opinions in recent cases involving radio broadcasting licenses. *Federal Communications Comm'n* v. *National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943); *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875 (1942); *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940).

[23] POMEROY, EQUITY JURISPRUDENCE § 1341 (5th ed. 1941).

has no standing to sue. The temporary injunction heretofore issued by the District Court on June 4, 1948, will be continued in effect until final disposition of the action by that court.

Reversed and remanded for further proceedings in accordance with this opinion.

Dissenting Opinion

Edgerton, J., *dissenting*: Our former judgment was that the District Court might grant or deny a motion to amend the complaint "as in its discretion seems proper." That judgment became final long ago. This court now reverses it and requires the District Court to grant the motion. This reversal seems to me not only inconsistent with orderly procedure but probably beyond our authority.

I agree with the District Court that the proposed amendment of the complaint would add nothing material. On the former appeal we did not undertake to decide that question. I think the Department regulation on which this court now relies was not intended to be, did not appear to be, and was not a term or condition of appellant's lease. Its apparent purpose and effect were not to increase the rights of lessees, but to limit the expectations of applicants for leases. It did not purport to control the discretion of the Secretary in making leases, but only that of his subordinates in making "favorable recommendations." Moreover the United States is a necessary party when suit is brought to prevent the leasing of its lands.

208-211 UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1949

No. 9946

[File endorsement omitted]

Sheridan-Wyoming Coal Company, Inc., appellant,

vs.

Julius A. Krug, appellee

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Before: Edgerton, Clark and Prettyman, *JJ.*

Judgment—Filed January 31, 1949

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment—of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

PER CIRCUIT JUDGE PRETTYMAN.

Dated January 31, 1949.

Dissenting opinion by Circuit Judge Edgerton.

212 Clerk's Certificate to foregoing transcript omitted in printing.

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213 IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 60

JULIUS A. KRUG, PETITIONER

v.

SHERIDAN-WYOMING COAL COMPANY, INC., RESPONDENT

Stipulation and Addition to Record

Filed July 12, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for a writ of certiorari, the printed record shall include the temporary injunction issued on June 4, 1948, by the District Court of the United States for the District of Columbia, a certified copy of said temporary injunction being attached hereto.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

STEPHEN J. MCMAHON, JR.,
Counsel for Respondent.

JULY 12, 1949.

214 Clerk's Certificate to following paper omitted in printing.

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215 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., MONARCH, WYOMING, PLAINTIFF

v.

JULIUS A. KRUG, WASHINGTON, D. C. DEFENDANT

Temporary Injunction Pending Disposition of Motion for Preliminary Injunction and Motion for Leave to File Amended Complaint

Filed June 4, 1948

This cause having come on for hearing upon plaintiff's motion for leave to file amended complaint and the same having been argued by counsel, and the Court having decided to take the matter under advisement and further consideration before disposing of said matter,

And a temporary restraining order having been issued from this Court by its Chief Justice on November 4, 1947, and this Court having continued its temporary restraint by Mr. Justice Holtzoff after dismissal of the complaint until plaintiff had opportunity to take its appeal to the United States Court of Appeals for the District of Columbia, and that Court having issued a temporary injunction pending appeal on December 4, 1947, which temporary injunction was extended ten days beyond receipt of the mandate by this Court, which extension expires this date, the fourth day of June 1948,

216 Now, therefore, it is hereby ordered that you, Julius A. Krug, the defendant herein, be and you are hereby temporarily restrained and enjoined from signing, causing, suffering, or permitting the issuance to the Big Horn Coal Company of the coal mining leases known as Buffalo 037885 and Buffalo 039466, involved in this case, and that all persons acting in concert or participation with you and your agents, deputies, attorneys, and employees, are hereby temporarily restrained and enjoined from issuing, signing, causing, suffering, or permitting the aforementioned coal mining leases, Buffalo 037885 and 039466, to be issued to the Big Horn Coal Company.

This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect until the

further order of this Court upon the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted then, the motion for preliminary injunction shall be further heard within ten days thereafter.

F. DICKENSON LETTS,
Justice.

Dated: June 4th, 1948.
Approved:
T. PETER ANSBERRY,
Attorney for Plaintiff.
RALPH S. BOYD,
Attorney for Defendant.
217 [File endorsement omitted.]

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218 SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 60

Order Allowing Certiorari

Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 863479 919